

with it when it dismissed the complainant from its staff. Indeed, it recognized no authority at all. A conclusion of the respondent acting in a discriminatory manner is inescapable.

[26] From the evidence presented at this hearing, the respondent really had little or nothing to go on in concluding as it did with respect to the complainant's future. It is my opinion that, in order to satisfy the intent of the words "occupational requirement," much more investigation, evidence and evaluation, with respect to the complainant's ability to do the job, is required of the respondent before a decision to terminate can be made. An impression or perceived consequences that could flow from an employee's return to work is not sufficient to justify termination, particularly when these perceived consequences are not suggested by any medical opinion provided to the employer by the employee.

[27] In summary, after applying the objective test that McIntyre J. outlined in *Etobicoke, supra*, I find that the respondent has failed in its endeavour to establish the existence of a BFOR for its termination of the complainant. Not only did it fail to produce evidence that would even suggest that a limitation on the complainant's continued employment was reasonably necessary to ensure the efficient performance of the job without endangering the complainant, other employees and the general public, the respondent also refused to

give even monetary consideration to medical opinion which indicated that the complainant was fit to continue his employment.

[28] I find that the respondent contravened s. 8 of the Act when it terminated the complainant.

I am required by s. 17(2)(a) of the Act to order the respondent to cease the said contravention and refrain from committing the same or similar contravention and I so order.

[29] The complainant stated that he attempted to mitigate his loss of employment although he testified that, after his termination, he lost his confidence in his ability to find other employment. I accept that he tried to find work, but it took him two months to succeed in that endeavour. Therefore, I award to him two months' salary. The Earnings Record of the respondent show that the average two-week income of the complainant during the first six months of 1988 was \$697.45. Therefore, during the time between August 15 and October 15, 1988, the probable income the complainant would have earned would have been \$2,788.80. I order that the respondent pay to the complainant a total of \$2,788.80 as compensation for his loss of income during the noted time.

I also order that the respondent pay the complainant \$2,000 as some compensation for the loss of self-esteem, emotional injury and humiliation caused as a result of the contravention.

Jagdish Bhadauria and the Ontario Human Rights Commission

Complainants

v.

Board of Education for the City of Toronto

Respondent

Date of Decision: April 6, 1990

Before: Board of Inquiry, Paula Knopf

Appearances by: P. D. Jackson and Edward Babin for the Ontario Human Rights Commission

S. John Page for the Complainant
Jagdish Bhadauria

John P. Bell and Martin Peters for the
Respondent Board of Education for the
City of Toronto

RACE, COLOUR AND PLACE OF ORIGIN—promotion denied—discrimination based on perception of race—EMPLOYMENT—fairness in selection process

Summary: *The Board of Inquiry dismisses the complaint of Jagdish Bhadauria who alleged that the Toronto Board of Education discriminated against him because of his race and ethnic origin when it refused him a position as a vice-principal.*

Mr. Bhadauria alleged that the selection practices used by the Toronto Board of Education between 1980 and 1984 had an adverse impact on him and other persons of South Asian origin. The Board relied heavily on personal interviews, making them the key factor in its assessment of candidates for vice-principalships. Mr. Bhadauria contends that this creates a disadvantage for persons from South Asian cultures who are likely to be more deferential and less forthcoming in a formal interview setting than candidates of Western European origin.

Mr. Bhadauria began teaching with the Toronto Board of Education in 1971. He has an excellent record, and is highly thought of by his colleagues and supervisors. He has been a department head and a summer school principal. Between 1980 and 1984 he made 39 applications for a vice-principalship. He was selected for a pre-interview on 4 occasions, but he was never selected for a full interview and never appointed to a vice-principal position.

The Board of Inquiry accepts the evidence that, while there are many variations among individuals, there are certain cultural characteristics shared by persons of South Asian ancestry which must be acknowledged if efforts to overcome cultural bias in hiring procedures are to be successful. Denying such characteristics would be to deny the cultures and the impact of cultural differences. The Board also concludes that in South Asian cultures hierarchy is honoured and collective interests, as opposed to individual interests, have a high value. These characteristics may be manifested in a hierarchical attitude towards social encounters, especially formal ones like interviews, and in a reluctance to speak openly to persons perceived as not belonging to one's group.

The Board finds that these are identifiable characteristics of the South Asian culture and that Mr. Bhadauria is a member of that culture. However, the Board rejects the argument that the interview process per se had an adverse impact on South Asians including Mr. Bhadauria.

The Board finds that the available statistical evidence cannot be relied upon as proof of the adverse impact of the interview process because the number of South Asian applicants is too small to allow a statistically valid measurement. While the Human Rights Commission has established that the being a member of a South Asian culture can lead to a theoretical problem with the interview process, the Board finds that the Commission has not established that actual problems of discrimination occurred for Mr. Bhadauria or other South Asians. Nor does the evidence show, the Board rules, that the criteria used by the Board of Education to assess candidates disadvantaged South Asians. The criteria used to assess candidates for vice-principalships were justifiable and job-related.

In Mr. Bhadauria's case the Board concludes that he was not disadvantaged by the interview situation. He was able and willing to communicate a great deal of information. The Board of Education's selection committees did not approve of Mr. Bhadauria's responses when he was questioned regarding discipline. Their disapproval was not related in any way to cultural perceptions or misconceptions.

While the Board of Inquiry finds that the interview process did not have a discriminatory impact, and consequently there is no violation of the Human Rights Code, it comments that the interview process followed by the Board of Education between 1980 and 1984 was seriously flawed and led to this complaint being filed.

The complaint is dismissed. The Board of Inquiry retains jurisdiction to deal with the issue of costs, should the need arise.

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1. Introduction

[1] The beginning of this decision must start with a comment that this case involves very serious and important issues. The ultimate result will have a profound impact upon the parties. The hearing of the matter took 50 days and involved hundreds of exhibits. For the complainant Jagdish Bhadauria, the case involves a claim that he has suffered as a result of systemic discrimination by the Toronto Board of Education (the "Board") in its promotional policies. Mr. Bhadauria has exposed his personal life and professional reputation in an effort to establish his claim. His professional future with the Board may be affected by this case. Further, the Human Rights Commission has vigorously presented this case as a type of test of the protections offered in the *Human Rights Code*, 1981, S.O. 1981, c. 53 for cultures which are vulnerable to systemic discrimination. On the other hand, the reputation of the Toronto Board of Education has been at stake. The Board has been acknowledged as one of the leaders in the country in the formulation of race relations policies in all aspects of its operations. Yet, it is accused here of promotional practices which have the effect of having an adverse impact on South Asians. Any human rights board of inquiry deals with important matters which often have far-reaching implications. But given the enormous responsibilities of the adjudicator in this case, I embark on the determination of these issues with a real sense of humility and concern.

[2] The numerous days of testimony covered many difficult factual, intellectual and legal issues. It is impossible and inappropriate to record or reproduce them all in this award. The many volumes of transcripts and exhibits exist for that purpose. Instead, the following is a synthesis of the relevant evidence and resolves the factual disputes only where necessary. While all the testimony, documentary evidence and submissions have been reviewed and considered carefully, this decision only attempts to replace the governing factors and principles that were influential and that are necessary for a reader to understand the reasons for the ultimate decision.

2. The Nature of the Complaint

[3] At the outset it is critical to understand what the complaint is, and what it is not. This is not a claim that there was direct discrimination against Mr. Bhadauria. Instead, it is a claim of constructive discrimination as set out in s. 10 of the *Human Rights Code* with respect to his rights under s. 4(1).

4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

10. A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or consideration is a reasonable *bona fide* one in the circumstances, or

(b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

The alleged constructive discrimination relates to the process of application for promotion to a vice-principalship at the secondary level of the school system in Toronto. Specifically, the claim reads:

The promotional policies, procedures and criteria employed by the Toronto Board of Education in selecting vice-principals had a negative impact on the promotional opportunities of Jagdish Bhadauria *inter alia*, in the following ways:

(a) The excessive reliance on interview[s] disadvantages those persons who do not perform as well on interviews as they would during written evaluations. In Canada, such persons include those of South Asian origin.

(b) Criteria used to assess persons during interviews are developed in a manner that permits the use of requirements that are insufficiently related to the work required and which adversely affect persons of South Asian origin.

Such criteria include:

- warmth and openness;
- "sense of humour" and "gentleness";
- "articulateness" and "giving replies in depth".
- involvement in the life of a school;

(c) These criteria are applied during the interview without any method, as there is no points system. This permits an excessive element of subjectivity, which adversely affects persons of South Asian origin.

Thus, this case has scrutinized the promotional process adopted by the respondent Board of Education, its impact on Mr. Bhadauria, as a South Asian, and on South Asians in general. In the words of counsel for the Commission:

The issue of whether Mr. Bhadauria was the best person or not, is not the issue because that is a direct discrimination issue. The question is, was the process of selection such as to disadvantage him [Bhadauria] and other South Asians . . .

It is in this context that the evidence must be reviewed.

3. Factual Background

(A) THE TORONTO BOARD OF EDUCATION AND WHAT IS A VICE-PRINCIPAL

[4] The Toronto Board is a large school board serving approximately 70,000 students and over 150 schools. It employs approximately 4,500 teachers at the elementary and secondary levels. It is run essentially by a number of supervisory officers who, at all material times, were known as superintendents and associate directors. The superintendent staff consists of a number who are headquartered downtown in

the Personnel Division, Curriculum Division and other administrative areas. There was a decentralized system in effect where there were a number of area superintendents and school superintendents whose primary duty was the day-to-day operation of the school in the field and the supervision of the programs and personnel in the schools.

[5] In the forefront of the Board's operational decisions, and running as a theme throughout this case, was the philosophy of the Board to be sensitive to the needs of the community and serve them well. As Dr. Snell, the Associate Director of Operations, testified:

I think it is a fair statement to make that the Toronto Board has tried very hard to maintain neighbourhoods in the City of Toronto and that seemingly simple statement has a complex set of events behind it. Unlike most large urban centres, we have as a definite positive thrust tried to maintain the inner city neighbourhoods.

He continued by describing the political changes in the mid-1970s in the City of Toronto and the philosophy of trying to keep the centre of the city alive. Thus came the concept of keeping schools open and the Board's attempt to have a positive active relationship with the communities. Hence, the Board has chosen to emphasize community participation in the setting of criteria and the choosing of supervisory staff, including vice-principals. Thus, whenever a vice-principal vacancy arises, the students, staff and parents in the community are asked to draw up a list of "criteria" to be used in the selection of the candidates.

[6] The role of vice-principal itself is partly statutorily defined. S/he must assume the duties of the principal in that person's absence. The *Education Act*, R.S.O. 1980, c. 129, s. 236 describes the duties of the principal as:

It is the duty of a principal of a school, in addition to his duties as a teacher,

- (a) to maintain proper order and discipline in the school;
- (b) to develop co-operation and co-ordination of effort among the members of the staff of the school;
- (c) to register the pupils and to ensure that the attendance of pupils for every school day is recorded either in the register supplied by the Minister in accordance with the instructions contained therein or in such other manner as is approved by the Minister;
- (d) to establish and maintain, and to retain, transfer and dispose of, in the manner prescribed by the regulations, a record in respect of each pupil enrolled in the school;
- (e) to prepare a timetable, to conduct the school according to such timetable and the school year calendar or calendars applicable thereto to make the calendar or calendars and the timetable accessible to the pupils, teachers and supervisory officers and to assign classes and subjects to teachers;
- (f) to hold, subject to the approval of the appropriate supervisory officer, such examinations as he considers necessary for the promotion of pupils or for any other purpose and report as required by the board the progress of

the pupil to his parent or guardian where the pupil is a minor and otherwise to the pupil;

(g) subject to revision by the appropriate supervisory officer, to promote such pupils as he considers proper and to issue to each such pupil a statement thereof;

(h) to ensure that all textbooks used by pupils are those approved by the board and, in the case of subject areas for which the Minister approves textbooks, those approved by the Minister;

(i) to furnish to the Ministry and to the appropriate supervisory officer any information that it may be in his power to give respecting the condition of the school premises, the discipline of the school, the progress of the pupils and any other matter affecting the interests of the school, and to prepare such reports for the board as are required by the board;

(j) to give assiduous attention to the health and comfort of the pupils, to the cleanliness, temperature and ventilation of the school, to the care of all teaching materials and other school property, and to the condition and appearance of the school buildings and grounds;

(k) to report promptly to the board and to the municipal health officer or to the school medical officer where one has been appointed, when he has reason to suspect the existence of any infectious or contagious disease in the school, and of the unsanitary condition of any part of the school building or the school grounds;

(l) to refuse admission to the school of any person who he believes is infected with or exposed to communicable diseases requiring quarantine and placarding under regulations made pursuant to the *Public Health Act* until furnished with a certificate of a medical officer of health or of a legally qualified medical practitioner approved by him that all danger from exposure to contact with such person has passed;

(m) subject to an appeal to the board to refuse to admit to the school or classroom a person whose presence in the school or classroom would in his judgment be detrimental to the physical or mental well-being of the pupils; and

(n) to maintain a visitor's book in the school when so determined by the board.

The Regulations to the *Education Act* amplify these duties in Regulation 262, ss. 12 and 13:

Duties of Principals

- 12. (1) The principal of a school is in charge of the management and discipline of the school and, subject to the approval of the appropriate supervisory officer, is in charge of the organization of the school.
- (2) In addition to his duties under the Act, the principal of a school shall,
 - (a) supervise the instruction in the school and advise and assist any teacher, in co-operation with the teacher in charge of the organizational unit or program in which the teacher teaches;

(b) make allowance in the timetable for duties required of teachers in charge of organizational units or programs and for special duties required of any teacher;

(c) assign duties to vice-principals and to teachers in charge of organizational units or programs;

(d) hold meetings of the teachers to discuss matters relating to the management and organization of the school;

(e) make recommendations to his board respecting any additions or alterations that he considers necessary to the school building;

(f) inspect the school premises regularly and report promptly to his board,

(i) any repairs to the school that are required, and

(ii) any lack of attention on the part of the building maintenance staff of the school;

(g) instruct pupils in the care of the school premises;

(h) make provisions for adequate supervision during the period determined by his board under subsection 3(8), and for the supervising and conducting of any other school activity authorized by his board;

(i) exercise control over the amount of homework assigned to pupils;

(j) assign suitable quarters for pupils to eat lunch;

(k) report to his board in writing, on its request, on the effectiveness of members of the teaching staff;

(l) recommend to his board,

(i) the appointment and promotion of teachers, and

(ii) the demotion or dismissal of a teacher whose work or attitude is unsatisfactory, but only after warning the teacher in writing, giving him assistance and allowing him a reasonable time to improve;

(m) submit to his board an annual budget for supplies and equipment;

(n) report promptly any serious neglect of duty or infraction of the school rules by a pupil to the parent where the pupil is a minor and otherwise to the pupil,

(o) issue a statement of progress to a pupil withdrawing from the school or to the parents of such pupil where the pupil is a minor,

(p) provide for the guiding and counselling of pupils with respect to their duties, the courses of study and, where applicable, the vocations or future educational programs to which the courses of

study lead and the requirements for admission thereto;

(q) promote and maintain close co-operation with the residents and, where applicable, the industry and business of the community;

(r) provide for the placement of pupils eligible for admission; and

(s) where it is proposed to administer to a pupil an individual psychological examination or test, obtain written permission therefor from the parent of the pupil where the pupil is a minor, and otherwise from the pupil.

(3) Where two or more schools operated by a board jointly occupy or use in common a school building or school grounds, the board shall designate which principal has authority over those parts of the building or grounds that the schools occupy or use in common.

(4) Where, after reasonable notice by the principal, a pupil who is an adult, or the parent of a pupil who is a minor, fails to provide the supplies required by the pupil for a course of study, the principal shall promptly notify his board.

(5) A principal shall transmit his reports and recommendations to his board through the appropriate supervisory officer.

Vice-Principals

13. (1) A board may appoint one or more vice-principals for a school

(2) A vice-principal shall perform such duties as are assigned to him by the principal

(3) In the absence of the principal of a school, a vice-principal, where a vice-principal has been appointed for the school, shall be in charge of the school and shall perform the duties of the principal.

Mr. Bhadauria describes the responsibilities of a vice-principal as follows:

He is responsible for managing day-to-day running of the school . . . First and foremost is the management of the staff and students . . . timetabling is done, he is responsible for devising the timetable, making it . . . Management of the students is the primary responsibility of the vice-principal . . . [S/he] should be individually competent to look after the discipline problem. That forms a major part of the running of the school. Basically that's the major portion, dealing with the staff and students. Students is more than dealing with the staff. With the staff it's an advisory capacity, with the students it's an administrative capacity . . . [Regarding students] it's discipline, attendance, punctuality and any areas that affect the students. . . . To implement the Board's policies in the school, to implement the Ministry's policies in the school. This is part of the administrative responsibility . . . On top of that there are parents' committees in schools. The Vice-Principal is responsible for getting some feedback from the community

and making recommendations to the Board

[7] Bruce Snell divides the vice-principal's responsibilities into six functions:

- (1) An administrative/organizational function
- (2) A role to be played in student relations
- (3) Program and curriculum development
- (4) Staff relations, staff development, and staff evaluation
- (5) Special events that go on around the school, i.e. extra curricular activities
- (6) To be part of a leadership team in a school.

[8] Dr. Kenneth Leithwood testified regarding the issue of the role and responsibilities of a vice-principal. He is a Doctor of Educational Psychology and Curriculum Development and the author of a book called *Improving Principal Effectiveness, the Principal Profile*, (Toronto: OISE Press, 1985). With an apology to Dr. Leithwood for reducing his work to a very simple summary, it can be said that he identifies the levels of effectiveness for a principal and vice-principal. Each level increases the effectiveness and the highest level includes components of all of them. They are as follows:

Level 1—This is an "administrator" who is considered "marginally effective" but "nobody is firing that person." That is to say that s/he would fulfil only the minimum requirements of the job. The goal of any selection procedure would not be to hire such a person. Such a person would focus mainly on the regulation of the school environment.

Level 2—This is a "modestly effective" administrator. Such a person would focus on inter-personal relationships amongst staff and between staff and students with a goal of a "good atmosphere in the school." They rely very heavily on developing and maintaining inter-personal relationships as a response to most of their problems.

Level 3—Such a person focuses on programs with the technical aspects of the school becoming paramount, i.e. curriculum instruction and evaluation. They deal with decisions expediently, professionally and in a businesslike manner.

Level 4—This is the most effective principal or the "highly effective administrator." Such a person is described as a "systematic problem-solver" or a "bottom-liner." They are described as selecting their goals from multiple and public sources, translating these totals into short-term plans, attempting to influence all factors bearing on goal achievement, using a wide variety of strategies and are skilled in many forms of decision making. Dr. Leithwood described such a person as the kind of administrator that school boards should be designing selection procedures to try to find. Such a person would incorporate all the concerns and techniques found in the Levels 1 to 4 administrator.

(B) JAGDISH BHADAURIA

[9] Mr. Bhaduria is a man of considerable charm, intelligence and accomplishment. He was born in New Delhi, India in 1940. He is the oldest son of a family of the Kashatara caste which he describes as "second in the pecking order"

of castes in India and which represents the "ruling caste." He received undergraduate and graduate education in India achieving a Master of Science in Physics. He deliberately chose to enter the teaching profession, declining the opportunities in India for financial gain in industry and science. However, he then chose to move to England in 1964 in a quest for what he describes as "upward mobility." He successfully taught in England in a series of schools, including one which was a holding centre for "young criminals" pending their trials. He then emigrated to Canada in 1970 and began teaching with the Toronto Board of Education in 1971. In 1972 he followed the wishes of his parents and returned to India to complete a traditionally arranged marriage to a woman of his own caste. He pursued his education, attaining a Master of Education from OISE [Ontario Institute for Studies in Education] in 1982. He has done some work towards a Ph.D. with the University of New Delhi and towards an LL.B. with London University.

[10] He pursued his career in Ontario with success until the events giving rise to these proceedings. He has been acknowledged as being a good teacher, enjoying the respect of his students and fellow teachers. He rose from the ranks of being a classroom teacher in the secondary system to being appointed a Department Head at Lakeview High School in 1978. There is no suggestion that he performed his teaching and administrative functions in anything other than a professional and appropriate manner.

[11] He has also pursued other interests and achievements. He is a successful businessman in various enterprises, including the real estate field. He also ran for election as a Member of Parliament in the most recent federal election on behalf of the Liberal Party. In an election which gave the Conservative Party a majority government, Mr. Bhaduria succeeded in gaining 34 percent of the ballots cast, whereas the successful candidate got 48 percent. Thus, he achieved a very respectable showing.

[12] He has been personally active in the cause of human rights. Indeed, among his many pursuits in this field, he sat as a member of the Board of Education's Race Relations Sub-Committee which drafted the Race Relations Report in 1979 and which has been the basis of its race relations policy. He was also a member of the Board's Employment Programmes Task Force on Race Relations until 1984. Further, he was twice elected by his fellow teachers as Branch President of the OSSTF for his school. Thus, he clearly enjoyed their affection and respect. For many years he was active in the extra curricular activities of his various schools, serving on staff committees and assisting students outside of the classroom in areas such as chess, camera clubs and soccer activities. The extent of his participation was in dispute between the parties. But it is clear that he did participate in a significant way with various Board and school extra-curricular activities, at least up to 1984.

(C) MR. BHADAURIA'S INITIATION INTO THE PROMOTION PROCESS

[13] Before being eligible for consideration as a vice-principal with the Toronto Board, one must successfully complete a

"principal's course." Entry into the program is based upon Ministry of Education requirements as well as the Board being satisfied of certain things. These things include him being considered "an outstanding teacher," having the potential to become an outstanding vice-principal or principal in any school, having assumed and demonstrated leadership in and outside of the school, having skills in the field of human relations, with particular emphasis on teachers, parents and the community, demonstrating a willingness to upgrade and update the profession, and written and oral clarity in communication. In the fall of 1978 he was considered to have met these requirements and was accepted by the Board into the principal's course. He successfully completed this by April of 1981. He then began to apply for vice-principal vacancies.

[14] Between April of 1981 and June of 1984 he made 39 applications. He was never successful in obtaining the promotion he was seeking.

(D) THE PROCESS OF VICE-PRINCIPAL SELECTION
USED BY THE BOARD OF EDUCATION DURING THE
1981 TO 1984 PERIOD

[15] This is the process that is under attack in these proceedings. Therefore, it is essential to outline how the process operated.

[16] Once a vacancy for vice-principal is identified, it is announced to the teachers by a publication in the Toronto Board's "Weekly Circular." The notice invites applications and gives a brief description of the particular school involved. The notice is drafted by that school's principal.

[17] In a school where the vice-principal vacancy occurs, students, staff and parents are asked to provide lists of what the Board refers to as "criteria" for the selection of the vice-principal. The reason for this is historical and political as explained above. It was also thought that this would enable the selectors to be sensitive to the particular needs of each school as vacancies arose, including the ethnic makeup of the community.

[18] This process elicits three lists of desirable qualities for the future vice-principals. The lists usually contain 10 to 15 characteristics each, ranging in nature from being a "firm and fair disciplinarian," "sense of humour," "experienced in curriculum development," to "all things being equal, a female."

[19] At the same time as the criteria were being gathered, the Board collected information about all the applicants. Each candidate submitted a *curriculum vitae* and covering letter. There was no standard format for either of these and the exhibits show that they varied considerably in length and content, despite the Board's directory guidelines to keep the résumés within three pages in length.

[20] There was also an informal gathering of information that varied depending on which area superintendent was in place where the candidate taught. The area superintendents sat on the initial selection team together with the superinten-

dent of personnel. The superintendent of personnel would gather the formal documentation together. But the area superintendent in the district where the candidate taught would also gather informal information about the candidate by speaking to his/her principal, sometimes talking directly to the candidate, speaking to the candidate's school superintendent, and in general gathering information about the candidate's activities at present and his/her potential for leadership.

[21] The area superintendents, chaired by the superintendent of personnel, then met to undertake the task of short-listing the applications. Typically, they would receive 35 to 50 applications for each position. Six would be selected for a "pre-interview" which was actually the first round of interviews. The area superintendent from the area in which the candidate taught would come to the meeting with a copy of the candidate's *curriculum vitae*. No other area superintendents would get this. But all the area superintendents would be given copies of the criteria submitted by the teachers, students and parents. They would also all be familiar with the vacancy posted in the weekly bulletin. There was no other written material.

[22] Typically, the area superintendent where the vacancy existed would give a description to his/her colleagues of what s/he identified as the particular issues or needs in the school. Each area superintendent would give a report on the candidates in his/her area. This could include a report on extra-curricular activities, a summary of the *curriculum vitae* and a synthesis of the information gathered from other sources as well as the area superintendent's own assessment of the candidate's leadership skills and/or suitability as a vice-principal in that particular school.

[23] The evidence is less clear about how the committee utilized the criteria from the three sources at this stage. The Human Rights Commission suggests that there was no general discussion of the interpretation of the criteria. The Board suggests that there would be a general discussion about the criteria, but that this may have only been brief because of the superintendents' common experiences, backgrounds and understanding of what the criteria would mean. Given the time available for these meetings it must be concluded that there were no long or involved philosophical considerations of what the three lists of criteria would have meant. There may have been some discussion about particular schools' needs in some cases, but on the whole, the area superintendents operated, at this stage, on the basis of their similar understandings of what a vice-principal should be and applied this to the schools in questions. It is also worthy to note that at this stage the superintendent of personnel would mention that a particular candidate was a member of a visible minority and remind the superintendents of the Board's race relations policy and its formal desire to promote visible minority candidates.

[24] The area superintendents then began the process of determining the short list of six candidates who would proceed to a pre-interview. This was done on a "go round" basis hearing from each superintendent and eliminating the least appropriate candidates on a consensual basis until six were

left. The aim of this process was to come up with six candidates who were considered suitable to fill the vacancies. Thus, if a person was selected for the pre-interview s/he was considered, in theory, to be capable of filling the position in question.

[25] The pre-interview meeting was then set up. This began with the area superintendents meeting half an hour before the first scheduled interview. Again, they were given the criteria. This time they also received résumés of the six candidates. At this stage there was what was referred to as a "working of the criteria" by the area superintendents. This involved a discussion of the criteria on the three lists (see section 5(a) below). Each area superintendent then determined an area or subject matter from the criteria to use as a basis of questions to pose to the candidates. Typically, the subject would also be related to that area superintendent's personal interests or concerns. Each of their questions would be articulated to the group and then an order for questioning would be determined by the superintendent of personnel who chaired the process.

[26] In the meantime, candidates had been invited to attend for the pre-interview half an hour before the scheduled interview. In reality, often they were only able to arrive five or ten minutes before the interview. But in any event, they were offered coffee, given lists of the criteria and given a quiet, private place to contemplate the criteria prior to the interview.

[27] The process of the interview then began. Each interview lasted approximately 20 minutes. Each candidate was asked the same questions, in the same order, by the same members of the interview team. Follow-up questions were asked where necessary. Members of the teams may have made notes of the responses individually. This pre-interview is critical to the Board's process and is the item most under attack in these proceedings. It is clear from the evidence that the performance at the pre-interview determined whether one went any further in the process. Some evidence suggested all the information obtained from all the sources contributed to the decision. But the inescapable conclusion has to be that all candidates who were pre-interviewed were considered as suitable for promotion and relatively equal to each other in theory. Then, the performance at the pre-interview would determine who could proceed further in the process. After all the candidates were pre-interviewed, the committee then made its selection. This was done on the basis of consensus, discussing each candidate in rounds and then eliminating candidates until three were left. The way the "criteria" were utilized is discussed more fully below. (See section 5(a).)

[28] The three remaining candidates were then notified of their selection for the round of final interviews. The final interview was conducted in much the same manner as the pre-interview but with minor variations. These interviews were 40 minutes in length. The selection team then consisted of seven people, representing the Board, parents, the OSSTF, as well as superintendents. The interview process and the deliberations thereafter were virtually the same as for the pre-interviews. The selection team's decision was then relayed by way of a recommendation to the director of education who

took it to the Board for confirmation. There is no evidence that any recommendation has not been accepted.

[29] The penultimate part of the process was the follow-up counselling available to candidates. All the area superintendents offered follow-up counselling to unsuccessful candidates from their own areas. Any unsuccessful candidate who wanted to explore the reasons why s/he did not succeed had the opportunity of doing so with his/her area superintendent or with the Staff Development Department. These sessions would typically involve discussions about preparation for interviews, body language at interviews, mannerisms and areas of particular concerns to the individual and to interviewers.

(E) MR. BHADAURIA'S EXPERIENCE IN THE PROMOTIONAL PROCESS

[30] Mr. Bhadauria's evidence makes it clear that he has pursued the goal of becoming an educational administrator for many years. He took the time and the trouble to obtain post-graduate courses through OISE. He tried hard to gain acceptance into the principal's course. He sought and achieved every attainable credential short of a Ph.D. to qualify himself. He also chose not to transfer to other schools within the Toronto Board system even though he could have done so. For example, due to declining enrolment at Lakeview Secondary School where he taught in the early 1980's, the position of Department Head was taken from him. He had rights under his collective agreement to regain that headship at another school as soon as a vacancy occurred. He made a conscious choice not to do so and instead chose to focus on his pursuit of the vice-principalship. His ultimate goal was to become a superintendent. From 1981 to 1984, the period covered by this complaint, he made 39 applications for vice-principalship.

[31] Mr. Bhadauria testified that he received four pre-interviews. The Board's evidence is that up to six pre-interviews were given. But this evidence was vague and to a certain extent contradictory between Mrs. Banks and Mr. Hayes as to where the other two interviews occurred. Therefore, for the purposes of reviewing Mr. Bhadauria's experiences, only the undisputed four applications need to be considered at this stage; they are Danforth Technical in 1982, Western Technical in September 1982, Bickford Park High School in June 1983 and West Toronto in June 1983.

[32] An accurate reconstruction of these interviews from the testimony received is frankly impossible. The events occurred a long time ago. The only notes which remain were penned by Mr. Bhadauria, sometimes immediately after the meetings and sometimes well after the meetings. His notes do not purport to be complete transcripts of the sessions because they are very brief. However, the details they do record were not challenged by the Board witnesses. But, it is extremely difficult for anyone to give an accurate self-assessment or recollection of the stressful details in an interview. It is far too easy for one to misperceive too many things. Thus, it is difficult to put the notes in a realistic context. The three superintendents who were called to testify about these interviews did not produce notes. Those who had made notes destroyed them as a matter of routine business after

the selection and follow-up counselling processes were completed. Thus, we do not have the advantage of their assistance.

No useful purpose can be served here by relating all the details of these four interviews or all the aspects of the disagreements between the parties as to what occurred. The themes of the evidence about these interviews are so consistent that they can be dealt with together.

[33] In a nutshell, Mr. Bhadoria's evidence established two contradictory aspects of his interview experience. First, his testimony emphasized the appropriateness of his answers and conduct in the interviews, as well as his success in demonstrating his suitability for the jobs. Secondly, and in contrast, he spoke of the constraints he felt in the process because of his South Asian heritage. I shall deal with these in turn.

[34] Dealing first with Mr. Bhadoria's self-evaluations of his performance, he consistently described his conduct in the interviews as having performed "exceedingly well" or "very well." He offered several examples of questions asked of him and gave details of the replies which he recalled. While the respondent's evidence took issue with the appropriateness of the responses given in the interviews by Mr. Bhadoria, the respondent did not dispute or contradict the details which Mr. Bhadoria offered in testimony. It is clear that Mr. Bhadoria felt himself exceedingly well qualified for the positions and that he was able to present a good case for his selection at the interviews. He testified in cross-examination:

Q. You presented the best Jag Bhadoria that you could in these meetings [i.e. interviews]

A. In terms of the requirements and the expectations that I believe were applicable, I presented the best Jag Bhadoria ever.

Q. You didn't hold anything back?

A. I did not hold anything back

Q. And you believe that those—whatever made you the best Jag Bhadoria ever, that you conveyed them to those who interviewed you?

A. Whatever information was available to me that I believe made the best Jag Bhadoria to be an educational administrator, I conveyed those bits of information.

[35] In cross-examination he claimed to have "no difficulty" in displaying leadership skills and all the other characteristics necessary to be a vice-principal. He said, "If it is possible to display these qualities then I was able to . . . and had no difficulty at all." By his third interview he describes his own demeanour as "quite comfortable." Thus, one strong impression from Mr. Bhadoria's evidence was that he presented himself successfully and appropriately for the circumstances of a vice-principal vacancy interview.

[36] However, the second and contrasting impression that Mr. Bhadoria's evidence sought to convey was that he was constrained in his performance at the interviews because of

his South Asian cultural characteristics. The concept of cultural characteristics will be explored in detail below in section 6. But for these purposes, Mr. Bhadoria explained how his upbringing in India as a member of a society conscious of caste and hierarchy made him act in a manner that is overly deferential to authority and therefore awkward in an interview and unable to act appropriately. He says he believed he had to behave in a way that was "very formal" and had to give answers that were "businesslike and to the point." He sought and received two counselling sessions from his area superintendent, Mr. Hayes. He was told to try to relax in the interview and so he began to make concerted efforts to "relax" and not to be "uptight." He expressed concerns about causing offence to the interviewers over things like drinking coffee in their presence. He also tried to describe the feeling of trying to adapt to the authority figures of the superintendent interview team in light of what he described as a South Asian stereotype. Arising from this he was asked in cross-examination:

Q. Did you during these four pre-interviews, act like a meek coward?

A. Yes, I did to some extent, yes.

Thus, Mr. Bhadoria's evidence also sought to convey that the interview format did not enable him to present himself honestly, as he would have liked. He blames this problem on the difficulties of cultural perceptions.

[37] As a further contrast, the Board's witnesses portrayed a very different performance at the interviews, by Mr. Bhadoria, from anything he described. Counsel for Mr. Bhadoria and the Human Rights Commission aptly described the difference between Mr. Bhadoria's assessment of his performance at the pre-interview and the Board's superintendents' assessment of him as "stark in its contrast." Indeed, Mr. Bhadoria's own self-assessment and the assessment offered by the Board's witnesses do present very different pictures. There is no disagreement over the details of what was said. The disagreement is over the appropriateness of comments and conduct. The three area superintendents who testified described what they perceived to be an unwarranted self-image on the part of Mr. Bhadoria, a difficulty in answering questions, a person who offered inappropriate examples, articulated unacceptable concepts and a person who had difficulty in communicating in the interview setting. Superintendent Banks summarized her impression of Mr. Bhadoria's difficulties in answering questions in the interviews as follows:

Mr. Bhadoria has demonstrated throughout the interview process great difficulty in answering questions. I think that's reflected in the fact that the superintendents often had to ask a subsequent question to get more information from him. He spoke in generalities, he did not give specifics, and it was very difficult to elicit information from him about the kind of leadership that he would provide. We were met with answers that were often very brief, as well. So there was a pattern that was there . . . he used the word "administrator" a great deal, and the word administrator can imply an arm's length dealing with people, and we were looking for people in the Toronto system who reach out to people, who are interested in providing excel-

lent education for students, but are also interested in them as individuals, and we keep hearing the word "administrator" and "facilitator" was used here, and those are all classifications. It's very difficult to get a handle on how Mr. Bhadauria would deal with the students and staff from the answers he gave. I think the parents and education today deserve to have someone in charge of a school or a vice-principal who can articulate what the school is about. . . . I would say he was self-confident. Almost impatient at times, with the process itself, that we didn't seem to recognize . . . that he really was the best candidate that there was. We could not really understand that over a period of time that his interviews changed so little.

Superintendent Banks also stated that she was "appalled" by an example of a disciplinary response offered by Mr. Bhadauria. Other superintendents were not as emphatic about their disagreement over Mr. Bhadauria's disciplinary example. However, they did express concern that it was either an inappropriate example to give or indicated a lack of sensitivity and a rigid approach to discipline that was inconsistent with Board philosophy.

[38] Juxtaposed to Superintendent Banks' recollection of Mr. Bhadauria giving brief answers, Bruce Snell described Mr. Bhadauria's answers as "rambling and disjointed" and displaying difficulty in getting to a point. He described Mr. Bhadauria as having trouble articulating and communicating and being someone who is not a good listener or sensitive to the questions being asked by the Board. He also felt that Mr. Bhadauria displayed an inappropriate attitude towards discipline:

He gave the impression of rigidity, that there was an easy solution that leapt to mind and it was something—a problem that could be solved quickly.

[39] The third superintendent to testify was George Hayes. He was Mr. Bhadauria's area superintendent. Mr. Hayes described Mr. Bhadauria's demeanour and voice as being loud at the first interview which left an impression of aggressiveness. This was then tempered in subsequent interviews. However, Mr. Hayes also recounted being left with the impression that Mr. Bhadauria resented being asked certain questions or being asked to expand upon his answers:

One of the questions asked is why do you want to be vice-principal of Bickford or whatever particular school is being interviewed for and Mr. Bhadauria seemed to resent that, saying he could be vice-principal of any school and a vice-principal is a vice-principal and he could adjust to anywhere which the group didn't think was an appropriate answer.

The superintendents consistently used the question to determine how much the candidate had learned about the vacancy. They also offered this as an opportunity for the candidate to convince them that s/he was particularly suited for the school in question. All three superintendents were surprised by the lack of information Mr. Bhadauria would offer to them about his understanding of the schools in which he was seeking to fill the vacancy. They also expressed surprise over an instance of misinformation which he conveyed about facilities for wheelchair students in one school.

[40] While this is not a direct discrimination case, Mr. Bhadauria expressed intense distrust of Mr. Hayes and accuses him of virtually sabotaging his promotional aspirations. On the other side of the coin, Mr. Hayes spoke very favourably about Mr. Bhadauria and described their working together on a committee in the late 1970s. This created a very good impression upon Mr. Hayes and he explained how he essentially championed Mr. Bhadauria's promotional cause whenever a suitable vacancy occurred. Mr. Hayes explained that this was based upon his belief in Mr. Bhadauria's qualities and the Board's desire to promote visible minority candidates. Mr. Hayes says this explains why Mr. Bhadauria got so many interviews, even after interview performances were considered so poor.

[41] When asked about how the failure to obtain the position of vice-principal had affected him, Mr. Bhadauria answered:

It's something like saying, well, give me my life back. . . . I have not left a stone unturned that could have assisted me in the upward mobility to achieve my higher goal of becoming an educational administrator in the Ministry of Education. It's like asking, give my eight or nine years back since 1981 right up to today. No amount of description can describe. I'm not the same person at all that I was. My whole outlook has changed. . . . It has changed my whole life. It has changed me emotionally.

He went on to describe that in 1984 he stopped meeting and seeing people and attending meetings that had anything to do with the Board of Education. He claims he withdrew himself from everything. He stopped his extra-curricular efforts in the school. He lost 30 pounds. In his emotional testimony, he explained:

I could never imagine that any amount of tortures or punishment could affect my sanity. But finally, it took its toll on me. I had to see a psychiatrist. I had a beautiful family. The family broke down. I separated. . . . The amount of time I spent in fighting this process here and trying to get the evidence, the material. The amount of time I spent sitting in the Board library talking to other people. If I took all the hours probably it would be 7,000 hours which I could have used in some more productive manner, spending the time with my family, with my little children. . . . I don't think I can be the same person. Eight or nine years that I have been pushed back can never come back. . . . By now, I should have become a superintendent, and that was my desire. . . . Well, after my last interview I simply came to the doctor. Emotionally, I was insane and the doctor—my family doctor restrained me from taking any violent action.

(F) MR. BHADAURIA'S PERFORMANCE AND CONDUCT OUTSIDE OF THE INTERVIEW CONTEXT—1981–1984

[42] As alluded to above, Mr. Bhadauria achieved considerable success in his teaching, business and political endeavours. Fellow teachers called to testify on his behalf described him in very complimentary terms. Warren Kazor describes Mr. Bhadauria as "approachable and flexible" and having "fine communication skills." Mr. Kazor paints the pic-

ture of Mr. Bhadauria as "amicable, friendly, outgoing, chuckling . . . in conversations, sharing with colleagues." Another fellow teacher, Ed Houghton, describes Mr. Bhadauria as seeming to be "very capable of being a leader. I think he was well respected" by both staff and students. Pat Estaille described Mr. Bhadauria as having "excellent communication skills . . . successful in his classroom . . . firm but fair with students [regarding discipline] and possessing a fine sense of humour." Mr. Bhadauria also enjoyed success and respect in the summers that he served as the principal of Bickford Park Summer School. The superintendent evaluating him in that role was quoted as describing Mr. Bhadauria's performance as "outstanding." One teacher who served under Mr. Bhadauria's principalship in the summer school, Mr. Michael Masewich, described Mr. Bhadauria as having a sense of humour and being approachable by students, flexible and articulate, having an ability to compromise and willingness to participate in two-way conversations. William Belchos recalled instances during summer schools run by Mr. Bhadauria where he handled sensitive discipline problems very well. Mr. Belchos described Mr. Bhadauria as "obviously a capable leader" and having a "very direct and simple approach to communicating."

[43] The Board of Education's case never sought to dispute Mr. Bhadauria's level of success and accomplishment as a teacher, department head or summer school principal. All his achievements and successes in this area were acknowledged. As his area superintendent George Hayes explains, there "has never been any question about Mr. Bhadauria's administrative ability."

(G) SUMMER SCHOOL

[44] The Toronto Board of Education offers summer schools for its secondary school students. The program is six weeks in duration and is offered to students who need and/or want to pick up credits during the summer. Faculty are recruited on a volunteer basis. In 1980 Mr. Bhadauria was a vice-principal of a summer school and from 1981 to 1985 he functioned as a principal for the Bickford Park Summer Programme's complex involving approximately 400 students. It is common ground that in that role he had to fulfil all the requirements of a principal under the *Education Act*, including timetabling, discipline, hiring of teachers, management of the building, management of the budget, and other managerial duties. He also conducted staff meetings, and reported to the Board of Education.

[45] Michael Masewich had extensive experience as a summer school teacher and worked under Mr. Bhadauria. He testified on Mr. Bhadauria's behalf and described Mr. Bhadauria in very complimentary ways. Mr. Masewich cited a situation where Mr. Bhadauria handled a difficulty in a classroom very professionally and "the way I would have liked to have been dealt with if . . . I were having a problem in the classroom." Mr. Masewich described Mr. Bhadauria as carrying out his functions "ideally from the teacher's standpoint." Mr. Bhadauria's form of disciplining was described as "very fair and humane in his approach." The students considered Mr. Bhadauria as "no soft touch." Mr. Masewich indicated that Mr. Bhadauria was a "good leader" and "ran a

good school" and had the "knack . . . to run the staff meetings." Mr. Bhadauria was described as "personable" and that "people liked him." Regarding Mr. Bhadauria's ability to communicate, Mr. Masewich said "If something had to be said, Jag did say it and it would be understood. There would be no question about any intention. There was no double talk as far as Jag . . . was concerned . . . I think he has a pragmatic mind and would look for a practical solution. If there was a solution to be found he would find it." Finally, he described Mr. Bhadauria as having a good wit and a "jovial type of person."

This high praise is echoed by the Board's supervisory assessment of Mr. Bhadauria's performances at summer school in 1983 as "outstanding."

[46] The issue between the parties on the summer school experience is not how well Mr. Bhadauria performed there but the extent to which it is or ought to be significant in a vice-principal selection process.

There are clearly similarities and differences between the demands upon the administration of the summer school and those in the regular academic term. The administrative duties are similar and the statutory duties of a principal and vice-principal are identical. Indeed, Mrs. Banks said the summer school principalships are considered as opportunities for people interested in promotion to demonstrate their "organizational skills."

[47] The Toronto Board of Education's witnesses drew many contrasts between summer schools and regular day schools. The highly concentrated six-week program was said to affect many factors of the job and to create differences from the regular school year in that there would be

- (1) A different kind and lesser amount of parental involvement
- (2) a different kind and lesser amount of counselling required for students
- (3) a lesser need for discipline
- (4) little opportunity for staff development
- (5) "almost no point in any kind of community relations because students come from all areas across the City"
- (6) no extra-curricular activities.

[48] The Board witnesses sought to contrast this with the extensive role required from a vice-principal during the academic year relating to staff, extra-curricular activities, the parents and the community. The Board witnesses stressed that summer school principalships would give someone the opportunity to demonstrate "administrative and organizational abilities" and they conceded that Mr. Bhadauria's abilities in this matters have never been questioned. The evidence also established that many people who have been summer school principals have never progressed further in their careers. We were not told whether any of those who were not successful in gaining promotions were ever assessed as "outstanding" in their summer school roles.

[49] Dr. Edward Hickox, a professor of education adminis-

tration at OISE, was asked to comment on whether the administration of the summer school is a reasonable job to assess in terms of deciding on someone's capacity to administer a regular day school. Dr. Hickox answered:

In my experience with summer school or people who have worked in summer schools, is that it is an excellent laboratory so to speak to observe appropriate administrative behaviour because it encompasses the elements you find in a regular day school. You have in fact some more sense of a challenge . . . I think it is an excellent training ground.

Dr. Kenneth Leithwood offered a summary of the value of the summer school experience and how it can be utilized in the promotion selection process. He stressed the differences between the two experiences as flowing from the different time frames. He explains:

That is, what's possible and what isn't possible and how demanding those possibilities might be for someone within the time frame of a four- to five-week period. Clearly one does not have an opportunity in the context of a short period of time . . . to involve oneself in any significant school improvement efforts. I think it's also very difficult under those circumstances to do a very credible job of appraising the quality of staff. The scope of the responsibilities of the individual in terms of budget, association with parents and administrators, and the fact in most aspects of every school again speaking in general without being specific to the Board's summer school, seem to offer the principal of the school a real but constrained opportunity to either learn, or demonstrate leadership skills. It's by no means an irrelevant experience, it's a constrained experience.

Dr. Leithwood indicated that if a person was an effective summer school principal, that would not be sufficient reason alone to promote that person to a day school vice-principal. However, he was also asked what a report about someone being an "outstanding" summer school principal would indicate. Dr. Leithwood answered:

I think you would conclude that you had a high degree of potential that was well worth looking at more closely.

Dr. Leithwood suggests you would look closely by collecting other sources of information, including the responses in an interview.

Thus, the summer school experience is clearly considered by everyone to be an important fact in the selection process. The difference between the parties is their weighting of that importance.

(H) WHY MR. BHADARIA DID NOT RECEIVE HIS DESIRED PROMOTION

[50] The Board of Education gives inter-connected reasons why Mr. Bhaduria was not selected for a final interview and therefore never given the job of vice-principal. Mr. Hayes explains that Mr. Bhaduria was not selected because of Mr. Bhaduria's "unsatisfactory interview style." Further, the interview was used to determine which candidate should go forward to the final interview. Mr. Hayes admits in cross-examination:

Q. And what you are telling me is you were prepared to let your conclusion about a pre-interview and performance at a pre-interview overrule and discount a lot of other information that you had about communication skills about a candidate?

A. That's right.

Q. And if, in fact, Mr. Hayes, the area superintendents had the time and the resources to personally go observe Mr. Bhaduria in a discipline situation, in a leadership situation, and in an interaction with parents and teachers, would you agree that that would have been a superior method of assessment to a twenty minutes interview?

A. If we could have done that for each candidate, yes.

However, it is clear from the context of the testimony that Mr. Hayes neither considers the observation of each candidate by all superintendents to be practical nor possible, given 30 to 50 candidates or even the six short-listed applicants for each vacancy. Thus, the performance at the pre-interview was determinative and Mr. Bhaduria's lack of success in that context in the eyes of the area superintendents was critical. His inability to perform well at the interview prevented him from proceeding.

[51] Further, the Board's evidence sought to establish that the other applicants who were selected were superior to Mr. Bhaduria. Mrs. Banks explained:

A. There were other candidates who were superior to him in their interview and the way they handled the questions, and the way they demonstrated that they cared about what happened to students and staff. They were aware of Board policy, and they were able to articulate what education in Toronto was all about.

The role of a vice-principal in a secondary school is not an easy one, it's stressful, there is problem-solving required every day, there are demands from students, staff, parents, community that have to be met and one must be able to articulate, to listen first, and then to articulate and resolve problems. Mr. Bhaduria did not demonstrate that he had this capability.

Q. And how did the successful candidate for these schools that we have looked at compare with Mr. Bhaduria?

A. Well, they were superior in their ability to articulate what education is all about and the other things I have described. They handled themselves well under stress, so that you knew when they went in the school they were going to be able to deal with problems in a sensitive and caring way.

Thus, the Board's case was clearly that Mr. Bhaduria was never the best candidate for the vacancies and that he was never able to convey the right impression in the context of an interview, whereas other candidates were better able to do so. Further, the Board expressed concern that Mr. Bhaduria seemed to view the role of a principal as an administrative role which would deal with the students, staff, parents and community from an "arm's length" perspective. This was not what the Board wanted. Thus, he was never promoted to the position of vice-principal.

4. Race Relations and the Toronto Board's Formal Policy

[52] From 1977 to 1979 Mr. Bhadauria participated as a member of the Toronto Board's Race Relations Sub-Committee. That committee produced a report listing 119 recommendations dealing with hiring, promotion and working life to create equal opportunities for all. This has been described as the "cornerstone of the Board's race relations policy." In 1981 this report was adopted by the Trustees of the Toronto Board and became its official policy. With the adoption of the report, the Board created the office of the Race Relations Advisor and earmarked one million dollars to support its implementation. Training programs, review materials and consultancies were developed for all levels of staff, including management. Some of the contents of the *Race Relations Report* are directly relevant. First, in the area of employment/race relations and employment policy, the sub-committee stated its objectives as follows:

First There are requirements for active equal opportunity measures (Affirmative Action) that will assure those who have traditionally been excluded from access to career development opportunities with a possibility of success equal to all others if and when they choose to become candidates for promotion. Such measures would include providing possible candidates with opportunities to develop the confidence, competence and background necessary to make choices as to whether they become candidates or not.

Second There are requirements which will ensure as far as possible, that neither conscious [n]or unconscious prejudices and discrimination will become a factor in any employment or promotion decision. Such measures should include both preventative and curative measures.

Third There are requirements for measures which will ensure, as far as possible, that the Toronto Board of Education is, in reality, an equal opportunity employer and that it will be perceived as such.

Such measures should include appropriate communication information and notification methods that will serve to prevent widespread misconception about any given employment and promotion decisions.

Fourth There are requirements for measures which will assist all employees of the Board to accept and respect each others' racial/ethnic differences.

A statement [sic] be printed in a prominent place on all official application forms and on all letters of acceptance that racial/ethnic discrimination is contrary to Board policy and that it will not be tolerated

The relevant specific policies were:

88. (a) The Director establish clear and specific guidelines and criteria to assist in the promotion of employees to any position of responsibility on the academic teaching staff, the non-teaching academic staff and on the non-academic staff of the Toronto school system.

(b) At least the following be included in the final sets of guidelines and criteria established to accommodate item (a):

(i) Positive, genuine attitude toward visible and ethnic minority people.

(ii) Positive and accepting attitude toward the concept of a racially and culturally diverse society with equal opportunity and rights for all.

(iii) A genuine willingness to understand and be sensitive to the individual as an individual regardless of race or ethnicity

(iv) A reasonable knowledge and understanding of visible and ethnic minority groups

(v) Sensitivity to the needs of children of visible and ethnic minority groups and the problems confronting them in schools

89. (a) A survey procedure be undertaken for the purpose of identifying visible/ethnic minority and female employees of the Board

(b) This survey includes seniority and experience statistics on:

(i) All visible and ethnic minority employees and women in different responsibility categories in terms of actual numbers and percentages relative to the total employee group.

(ii) All visible and ethnic minority employees and women in terms of actual numbers and percentages relative to the total number and percentages of employees.

(iii) All potential visible and ethnic minority promotion candidates and women in terms of actual numbers and percentages relative to the different racial groupings that make up the total number and percentage of visible and ethnic minority employees and women.

90. A counselling program be established to provide information, advice, encouragement and support helpful to the advancement of employees thus identified

91. The Board initiate approaches to the Toronto Secondary School Principals' Association, the Toronto Public School Principals' Association, the Ontario Secondary School Teachers' Federation, the Toronto Teachers' Federation and unions and associations of non-teaching personnel for the purpose of discussing their roles in shaping actual strategies and procedures for implementing this recommendation.

92. The Board submit the survey results and its intended plan for action based upon the survey findings to the Ontario Human Rights Commission for its scrutiny

93. The survey and counselling program of parts 89(a), 89(b) and 90 be reviewed at the end of a five-year period for any revision and/or expansion or renewal that the Board may consider appropriate at that time.

94. The Director draft a procedure for promotion to the

position of Department Heads and Assistant Department Heads to replace the present process and to include a direct interview between the selecting body and the candidates standing for these promotions and report to the Promotion Evaluation and Procedures committee.

95. The recruiting and selection authority for the promotion of employees to position(s) of responsibility make all the criteria and qualifications necessary for the position(s) available in writing to prospective candidates well in advance of the promotion procedure.
96. For a given promotion, factor(s) not included in the published criteria must not become the deciding factor(s) in the final decision.
97. After selection, the promotion authority communicate in writing with all unsuccessful candidates and:
 - (a) Inform the candidates that they were not selected,
 - (b) State that further information and explanation concerning their application is available upon written request,
 - (c) Upon request in writing, the promotion authority provide suggestions on ways and means to improve chances for promotion of unsuccessful applicants when they next apply,
 - (d) Inform the unsuccessful candidate that if he/she wishes to appeal the decision such an appeal must be made in writing to the Director of Education by not later than 4:00 p.m. on the Monday of the week of the regular Board meeting at which the promotion would become official.
98. A Promotion and Employment Appeal Committee of high credibility be established to receive and consider appeals from unsuccessful candidates for employment and promotion who feel they have been treated unfairly on grounds of race/ethnicity:
 - (a) The Committee report to the Board through the Personnel and Organizational Committee,
 - (b) The Committee be appointed by the Director and consist of 3 representatives from the community, 3 representatives from the system and 1 trustee to act as chairperson,
 - (c) Up to two members of the Committee be provided access to any or all employment and promotion meetings at the Promotion and Employment Appeal Committee's discretion,
 - (d) Members appointed to the Committee be required to attend appropriate sensitivity training workshops.
99. Should an appeal be launched up to 4:00 p.m. on the Monday of the week of the regular Board meeting at which the promotion would become official, the promotion be delayed until the next regular meeting of the Board. During the next three weeks the Promotion and Employment Appeal Committee would meet,

hear the case and make its recommendation to [the] Personnel and Organization[al] Committee] who would then make a final recommendation to the Board.

[53] In 1984 the Board chose an outside, independent consulting firm to report on the extent of implementation of the *Race Relations Report, supra*. Thus, the *Hittner Starr Report* was produced in the spring of 1985. The review done by them covers the same period as the complaint. The Board objected to some of the "prose" in the report as being non-representative. But the report was accepted as "valid" on the whole. Specific problems which were identified by Hittner Starr are relevant. They were:

- (1) The Board had not set up an employment and promotional opportunity reference group to advise the Equal Opportunities Officer on employment matters and assist in developing programs.
- (2) The Director of Education was not submitting an Annual Report to the Board on the progress of equal opportunity.
- (3) As of 1985 there was no specific report or study by the Board to determine the proportion of ethnic groups in positions of responsibility.
- (4) There was nothing to ensure that all Board staff received race relations training.
- (5) There was no formal, publicized process for identifying and counselling those visible minority employees who are potential candidates for promotion.

Hittner Starr recommended, *inter alia*, that workshops be offered to all hiring committees to assist them in developing clear selection criteria.

[54] Despite problems with implementation and failures to achieve all the desired goals of the policy by 1984, there was evidence of positive steps towards implementation that must be credited. In the early 1980s all levels of staff, including superintendents, were offered sessions designed to sensitize them to cultural differences in the interview context and to enlighten them on the multicultural nature of the city. The *Race Relations Report, supra*, was distributed to everyone to use as their "operation manual." By 1982 and 1983, the race relations and equal opportunity advisors were running counselling programs for teachers to advise them on promotion paths through the system and to assist them with interview skills. Interview skills seminars were being offered. Unsuccessful candidates were allowed the opportunity to enquire as to why they did not succeed and to seek information and counselling in order to improve and build confidence. This would be done through area superintendents, the Staff Development Department or the Superintendent of Personnel.

5. The Selection of Vice-Principal and How it was Done

(A) THE USE OF THE "CRITERIA"

[55] As stated above, since the 1970s the Board of Education has filled vice-principal vacancies with reference to lists of criteria solicited from teachers, students and parents in the schools where the vacancies arose. These lists were given to

the selection committees and to the candidates alike. Mr. Bhadauria and other witnesses who had been through the process understood that the selection would be based on the criteria alone. Indeed, this was a requirement of the *Race Relations Report*. Therefore, it is important to examine these criteria and how they have been used.

[56] First, it must be stressed that there were at least three lists produced for the 39 vacancies in question here. Each list contains over ten "criteria." Therefore there are hundreds of "criteria" in this case and between 30 to 50 per school. It was acknowledged by Board witnesses that no one person could possess all the "criteria" or attributes listed, even for one school. The "criteria" specifically challenged in the complaint are:

Warmth and openness

Sense of humour and gentleness

Articulateness and giving replies in depth

Involvement in the life of the school

The Human Rights Commission cites these "criteria" as being insufficiently related to the work of a vice-principal and as adversely affecting people of South Asian origin who have South Asian cultural characteristics. Other criteria were attacked as being too vague and broad and thus susceptible to different interpretations by different people, resulting in an inability to conduct a valid assessment of candidates. Representative examples of such "criteria" taken from the West Toronto vacancy are:

- (a) Works with students, staff, administration and the community with understanding, co-operation and support
- (b) A firm disciplinarian who is willing and able to support the school's and the community's expectations concerning student conduct and attendance
- (c) Experience and practice in curriculum development and curriculum implementation
- (d) Familiarity with the wide range of programs offered in the school
- (e) The person should be a humanitarian
- (f) Be a firm and not too strict disciplinarian
- (g) Doesn't let the job go to his or her head
- (h) Fair
- (i) Open to young people and their problems
- (j) Have self-control
- (k) Realistic approach to language development and appropriate tests
- (l) Know and understand the various cultures represented in the school
- (m) Be prepared to provide realistic life skills programs for students which will help kids to experience work situations and understand the real work world
- (n) Socially oriented approach
- (o) Be self-confident

(p) A strong background in extra-curricular involvement in school

(q) Familiar with semestered system

(r) Familiar with Level 4 and 5 program

(s) Willing to get involved in the community

Counsel for the Commission methodically questioned every area superintendent who testified and one of the successful candidates, Usha Finucane, as to their individual interpretations of each of these criteria. Each gave a detailed and thoughtful answer. Their answers displayed variations in their understanding of each concept, yet a similarity of thoughts and concerns.

[57] It is also clear from the evidence that there was no systematic or formal discussion of the list of "criteria" given to the area superintendents to determine if they all shared the same interpretation of the "criteria" and/or how many of the "criteria" they would apply in the selection process. The superintendents who testified talked about their having a shared understanding of the meaning of the "criteria" based upon their years of experience as teachers and administrators with this Board of Education. As explained by Superintendent Banks:

I think one of the things I would like to point out to this Board of Inquiry is that all of us had been administrators in a school. There is nothing in the criteria that we would not be looking for as administrators and candidates for leadership. Our questions are formulated from our background of experience, and our knowledge of the criteria that the parents have presented, and so when we are formulating a question we have a concept of leadership that is required in the school and you can identify the parent and student criteria in those terms. There is nothing new in any of the criteria that I have ever seen. They are amazingly congruent, and I would just like to say that all of us were well experienced, both in schools and in interviewing [Emphasis added.]

Superintendent Banks also explained that each "criteria" was not systematically applied to each and every candidate.

Well it appears that what is happening [is] that people consider that you take each of the criteria, you give a weighting to them and that was not the case . . . all of us have been administrators in a school, and that when you go to a meeting to look at criteria, you are relating it to your background of experiences as an administrator. You cannot analyze people in terms of individual criteria, and to say this one is higher in this regard and this one isn't as high, but higher in another one, and that was not the way the assessment was done. You have to look at the whole person. You don't look at parts of people and rate them. It's like the point system. To try to look at the sum total of someone's characteristics and abilities is what we're trying to do. Not to isolate certain things that they do and certain things they don't do. You're looking at a total assessment in terms of our backgrounds of experience, what we knew about the school that has the vacancy and the needs of that school and you relate the criteria to the needs of the school . . . And so you're looking at the over-

all school and what you know is required and relating it to those criteria.

These views of Superintendent Banks were shared by her colleagues who testified. It is clear that they received and considered the lists of "criteria" given to them by each of the constituent groups. It is clear that their similar and shared experiences gave them a virtually common understanding of what these "criteria" mean. As Mr. Snell described, they would not be "wide ranges of view" between them, as superintendents.

[58] They also conceded that their interpretations of the "criteria" and expectations may differ from the groups who generated the "criteria." Further, the staff and students of the school could express different views about discipline and seek to apply different criteria in the area to the vice-principal. But this was accepted "as a given" and indeed, as fuel for discussion and exploration at the interviews. Mr. Snell had been asked about the possible different interpretations to apply to criteria about discipline as offered by the different constituent groups and the following exchange occurred during his testimony:

Q. In assessing the candidate, do you take the staff's views or the parents' views [of discipline]?

A. Good question for the candidate.

Q. What about the area superintendents in assessing the candidate?

A. An equally good question for the area superintendent. But that's the whole point. It is a fact of life in a school that there may be different expectations around discipline. In point of fact there may be [sic] different expectations around discipline in the abstract than in the particular. I as a parent may agree on certain standards that work until my own kid is in trouble. And in point of fact, if they [sic] are different expectations around discipline it would be interesting to know how the candidate would deal with it in terms of the school writing up its own code of conduct. To what extent would the school have involved the parent community? A good question for the candidate to ask.

[59] With regard to specific "criteria," all the superintendents bridled at questions which tried to pin down, through cross-examination, the significance of one type of "criteria." The best example of this was the importance of the requirement of a "sense of humour." It is to be recalled that Mr. Bhadauria was said to have a good wit, but not to have demonstrated this at the interviews. Its absence was often cited as a factor in his lack of success. It is often listed in the "criteria" for selection. The evidence of the area superintendents tried to establish that a "criterion" such as this should not be viewed in isolation and would not be the determining factor. As Superintendent Banks expressed exasperation at the litigation process trying to pin down the factor of a sense of humour:

I cannot expect people who are not in education to grasp something we have been working with throughout our careers. It isn't just a sense of humour, it's the whole way that you demonstrate how you work with people, and to try to isolate the sense of humour as a single criteria, it is not

one of the determining factors. It was a part of the whole consideration of the criteria. It was not singly discussed about every candidate.

[60] But all the evidence establishes at least two misconceptions surrounding the notion of the criteria. First, candidates were led to believe that the selection would be made on the basis of the list of "criteria" given to them prior to the interviews and drafted by the parents, teachers and students. Indeed, Mr. Snell agreed that each candidate "should be able to be confident that this selection will be done according to those criteria and not according to something else." However, the evidence demonstrated that far more than those lists of "criteria" were used to make the decision. Mr. Snell admits they used the "criteria" "to see how the candidates fit the specific expectations of the school." But, he also went on to explain how the superintendents also have a "basic expectation of what the candidate will do in a school." This would not be set forth in the list of "criteria." Other factors which the evidence revealed were applied to candidates and weighed upon the decision were:

- i) Performance at previous interviews
- ii) How they would fit within the existing administrative team and staff at the school
- iii) The particular needs of the school as perceived by the area superintendents, as opposed to the perceived needs of the school itself, i.e. whether "new blood" was needed
- iv) The potential of the candidate for further advancement
- v) The length of service with the Board
- vi) The nature and type of school(s) where the candidate had taught previously
- vii) Whether the candidate had "leadership" qualities
- viii) All things being equal, preference was given to women and visible minorities

Thus, the first misconception about the "criteria" is that they are the only factors used to determine the suitability of the candidate.

[61] The second misconception is that the "criteria" were indeed criteria at all. A criterion is a "principle or standard that a thing is judged by." See the *Oxford English Dictionary*. A simple review of the lists of "criteria" reveals that they are more in the nature of ideal qualities, characteristics or abilities desired in a vice-principal. In terms of the real expression of the principles or standards by which vice-principal candidates were judged, the most cogent expression of these seems to have been articulated by Superintendent Banks. She said that they were looking for a concept of "leadership" which she expressed as follows:

I believe that in Toronto because of the nature of our student body and our teaching personnel, that we require people who have sensitivity, who work co-operatively with their colleagues and with parents, and I want to emphasize the parental concept because schools were viewed as an institution, as apart from the community, and so one of the leadership qualities that was very important in Toronto was someone who could reach out to parents to

interpret to them what the school was doing, what was expected of students, to provide community [sic] kind of liaison with the school. We need people who have a sense of values in terms of developing a code of discipline for students, someone who possesses flexibility, in terms of the change that we are seeing in education. And there have been massive changes particularly at the secondary level. Someone who knows curriculum, and is able to implement the policies that come to us from the Ministry, someone who is able to capitalize on the leadership qualities that the staff possess and to step aside and give them responsibilities. Someone who is aware of the political realities of the Board . . . We are a very political Board and it behoves anyone in a position of responsibility to be aware of the policies that the Board is concerned about and I want to emphasize that Toronto was the first Board to have a race relations policy . . . At the secondary level, there is a hierarchical structure of principals, vice-principals, department heads and we were also looking for ways of utilizing the strength of those people in the school and also developing the leadership skills in the staff. I think that's pretty well it.

If it is possible to summarize or isolate the criteria or standards that candidates were judged by, the evidence leads to the conclusion that it was this concept of leadership that was articulated by Mrs. Banks that the selection committees were applying to the candidates. Hereinafter, this shall be referred to as "the Banks concept of leadership."

6. Selection for Promotion—What is an Acceptable Technique

[62] Too often, but necessarily so, cases like this focus on what is wrong with a particular technique. A case involving litigation has the luxury of looking back on something and saying what is wrong with what was done. Indeed, the focus of a board of inquiry is to see if particular conduct violates the protections of the *Human Rights Code*. Thus, we are focusing on whether the system used by the respondent has flaws that resulted in constructive discrimination.

[63] In this context, we have the benefit of the evidence of Professor Cynthia Fekken. She is an Assistant Professor of Psychology at Queen's University who specializes in psychometrics or the theory of measurement and assessment. She testified about the recognized standards within the field of personnel selection. She explained that personnel selection techniques are assessed in terms of "reliability and validity." Reliability refers to the constancy or stability of the measurement. "Reliability is a prerequisite for validity." Validity has to do with the accuracy of a particular measurement device. She describes validity as "a matter of the bottom line. Without validity you are essentially going through a charade of applying a particular assessment device . . . You might as well draw names out of a hat if your selection procedure totally lacks validity. . . . Bias tends to reduce validity." She describes bias as "an influence that adds error or distorts the information that you are getting from your selection instrument. . . . the effect of bias is to reduce the accuracy of your measurement."

[64] Dr. Fekken's evidence was detailed, articulate and thoughtful. To reduce it to simple terms may not do her full justice, but an attempt is necessary. She commented very critically on the Toronto Board of Education's vice-principal selection process and suggested that the procedures fell far short of "recognized standards of personnel selection." She testified that a valid procedure should start with a specific analysis of what the job entails and a determination of "job performance criteria." Then and only then should the process undertake a determination of "selection criteria" which are "most likely to be able to predict the job performance." Her understanding of the process of the Toronto Board is that there was no specific job analysis and no development of clear job performance criteria. She expresses concern and doubt as to whether the "criteria" generated by the students, teachers and staff are even linked to the performance of the job which is to be filled.

[65] Further, she explained that the recognized standards for personnel selection demand specific selection criteria as opposed to "global" or "vague" criteria. She explained that specific criteria are necessary to ensure that they do not mean different things to different people such as the various members of the interview committee, the interviewer vis-à-vis the interviewee and the various groups which drafted the criteria. The value of specificity is to reduce the discretionary element and subjectivity. Further, she believes that specificity "enhances reliability."

[66] Dr. Fekken also explained that global criteria have been shown to allow a tendency on the part of interviewers to quickly form a positive or negative impression of a candidate and to continue to hold or solidify that first impression. Thus, the whole judgment will be governed by that initial impression. This has been aptly described as the "halo effect" in that one tends to view the candidate throughout the interview with the perspective of the initial halo. She advises that "by making the criterion specific, clearly defined and making the nature of the judgment very specific, you reduce the possibility that people are going to be susceptible to this overall halo effect." This halo effect is particularly dangerous in situations of cross-cultural assessment. Further, Dr. Fekken described the "contrast effect" where interviewers compare candidates to themselves and exaggerate the differences.

[67] Dr. Fekken's testimony speaks for the need for a structured assessment system in making promotional decisions so that the nature of the judgments is similar. Again, the purpose is to increase the reliability and enhance validity as well as reducing the possibility of bias.

[68] Dr. Fekken severely faults the criteria list generated by the teachers, students and parents for the Toronto Board as being too often vague and global in nature. Further, the very large number of criteria for each school causes problems for Dr. Fekken. As she said:

It's going to be very difficult to find any one candidate who meets all those criteria. In the absence of a very systematic way of evaluating the criteria, I think you are likely to end up with a comparison of a candidate who is an apple and a candidate who is an orange. . . . You are likely to

end up with evaluating or comparing your candidates on different criteria.

She says the problems arise from the fact that you are measuring something that is very global, that is not necessarily going to be reliable or valid and that is susceptible to bias and the halo effect.

[69] Dr. Fekken is also critical of the heavy reliance on the interview by the Toronto Board of Education. Her views on the interview as a selection technique are set forth in section 5(c). She suggests that a cognitive ability test measuring a variety of facets of cognitive ability and aptitude are superior to the interview. She also prefers assessment centres where candidates are observed over a two- to three-day period and assessed on a "whole variety of dimensions that have been identified as relative to job performance." Finally, she stresses that the more independent pieces of information you have on the candidate, the more reliable and valid would be the choice. Her evidence can best be summarized in her own words when she says:

I would judge, and the principles and standards would support me, that we need to begin with a job analysis. We need to examine what constitutes good performance on the job. And then selection criteria should be developed that are designed to predict, forecast who is likely to meet the job performance criteria. Those selection criteria should be specific. They should be clearly defined and they should require judgments for information of a structured nature. If an interview is going to be used to evaluate the criteria, that interview should be a structured interview and the interviewee should be trained. . . . I would say as well as a general principle, more information is better. So the more information that you can have that provides information that is relevant to your selection criteria the more likely you are going to be able to have a reliable and valid personnel selection procedure. . . . That could be information in the form of a standardized *curriculum vitae*. It could be letters of reference from people who know the job candidates' performance in their current jobs. That could be a structured cognitive ability test if you wish. That could be performance appraisals. The more independent sources of information that you have the more likely you are to get to the heart of the criteria. . . . Any one indicator is imperfect. And so as you add more and more indicators the amount of solid and true information that you are getting accumulates. So more indicators are likely to be more reliable and are going to be a better source of information on the relevant selection criteria.

[70] Dr. Fekken's views are echoed by Professor Edward Hickox. He studies education organizations and their context in society as well as aspects of their organization such as supervision. He is critical of the Toronto Board's promotional processes here in several respects. He faults the Board generally for failing to have a job description for a vice-principal, and specifically for the particular functions a candidate is expected to carry out when s/he fills the vacancy in question. Like Dr. Fekken, Professor Hickox feels that the selection criteria should be developed from a formal job description. Professor Hickox compliments the intentions of the Toronto Board in adopting its practices of soliciting criteria from con-

stituent groups, but he says:

I think that the policy of the Toronto Board has good intentions in that . . . it seeks to get input from various sources, parents, staff and students in secondary schools and those are good sources to get a feel for what the criteria should be. I believe that when you go to a group of people such as a group of parents you should ask them for their views on what is required for the job. I think you have to take that information and translate it in some way or another into criteria that are in a form that would be useful in making the selection

Again, like Professor Fekken, Dr. Hickox faults the list of criteria identified in this case as being too vague, too numerous and too susceptible to different interpretations from different people. In general, he agreed and expanded upon all of Dr. Fekken's evidence.

[71] In sharp contrast to the criticisms of Dr. Fekken and Dr. Hickox of the Board's criteria as being vague and unrelated to the role of vice-principal, Dr. Kenneth Leithwood testified for the Board to the contrary. He reviewed the contested criteria and concluded that most of them were "highly relevant to the job of school administrator." He analyzed the criteria in the thirteen originally under scrutiny, eliminated what he considered to be redundancy and reduced them to a list of 53 separate criteria. He then organized them according to what he described as a "higher order of category," grouping them into six categories of criteria on the basis of subject matter, namely:

- (a) Building and maintaining interpersonal relationships
- (b) Demonstrating leadership
- (c) Communication, i.e. speaking, writing and listening well
- (d) Awareness of school needs
- (e) Discipline
- (f) Open-minded/Flexible

He found that the criteria group themselves into these subject areas. He then canvassed all the literature in the field to see if it would "either support or deny the relevance of those criteria to the job of school administrator." He then produced a chart indicating and crediting the amount of evidence in the literature available to support those categories and sub-categories as "relevant" or job-related to the role of vice-principal.

[72] He did criticize other types of criteria in the lists such as "youth" which he considered discriminatory or "undertaking teachers' duties" as being very hard to do in the role of vice-principal. Dr. Leithwood concluded that insofar as the disputed criteria were concerned, there is a "very strong case" in the available literature to support their job-relatedness. However, it is clear that no party considered the discriminatory or unfeasible criteria identified by Dr. Leithwood to be operational in this case nor did the superintendents apply such criteria.

[73] Further, Dr. Leithwood commented on Dr. Hickox's claim that the criteria were too numerous. Dr. Leithwood

talked about the kind of synthesis that the superintendents did of the material by asking questions on those criteria that they considered to be especially relevant. Regarding the claim that the criteria were vague, Dr. Leithwood said:

You can never have a statement that isn't vague to somebody and you can never make a statement that is precise enough for everybody to understand it. So that's not even the issue I think. The issue is whether or not the people who have to use the statement have a common understanding of what the terms mean. I assume that a group of supervisory officers who have worked for a long time and have sifted through the kind of criterion statements that come from the school would be pretty consistent in an interpretation of these criteria.

He was prepared to concede that those being interviewed might have a less certain understanding of the criteria than the supervisory officers. But Dr. Leithwood added:

On the other hand, they came from the same Board, have worked with administrators of the Board, have an opportunity to talk from time to time with the supervisory officers. They should have more than a good guess of what these things mean I would imagine from being part of the Board community.

He did not share some of the concerns expressed that the interviewers and the interviewees may not have a shared understanding of the criteria that would be applied. Instead he placed responsibility on the candidates to gain an understanding of what would be required:

It is not clear to me that it's the selector's responsibility in entirety to ensure that candidates themselves have that [common] understanding. It seems to me part of the preparation for the selection process is to get clear on the nature of the criteria that are typically used and to understand what they mean.

Dr. Leithwood does not agree that it is important to have the candidate know which criteria are going to be chosen to be tested at an interview because:

that would violate some basic principles of testing at the present time. Those basic principles of testing assume there is a domain [of] knowledge. . . . [Those being tested are] expected to have knowledge or mastery of the domain and therefore be able to demonstrate mastery when asked about the sample of the domain. I take this to be a very similar circumstance where what the process does is provide the person who is being selected or candidate for selection more or less an indication of what the domain of criteria are and then set up the situation which a person's response to a sample of that domain is being requested through a more selective process.

[74] Further, although Drs. Fekken and Hickox preferred the use of a point system in assessing candidates, Dr. Leithwood argued that this is not appropriate in selecting someone for a role as demanding and complex as that of a vice-principal. He explained that the point system:

. . . essentially aggregates people's scores on a large number of criteria and has the effect . . . of glossing over what measurement might call the error in each of those

small judgments to begin with. What you end up with is the small sense of rigour in part by adding up scores and arriving at a number. The other thing I think you can do depending on how the points system is administered is forget that some of these criteria are more important than others unless there is a fairly sophisticated weighing scheme applied to the criteria. Someone might do very well but be missing an absolutely critical skill.

He gave the example of this danger to be the situation where someone may have a high score but be a terrible communicator. This would clearly result in an inappropriate choice of vice-principal. As he explained:

We are involved in making a judgment about a very complex set of performances and in any other fields like judging athletic events, like arriving at a suitable judgment in a court case, we don't try and award points to the case as it is being made on small issue as we go along. We look at the whole case basically or we look at the whole performance and we make a judgment about how it fits together and how it delivers what we think needs to be delivered and I think that's what we're about when we are making the selection of an administrator. I don't think we are ever in the business of saying we've got an absolute set of criteria someone is supposed to meet, and this person performs in a kind of numerical way better than the other. We're trying to make a judgment about which of these people seems to best meet the needs we have and we need to look at what their various strengths and weaknesses are across the criteria we think are important

[75] Finally, Dr. Stephen Cronshaw added another variation on the discussion of criteria. He is a professor of industrial/organizational psychology. His distinctions include his being chair of the committee to develop Canadian principles for validation and use of personnel selection procedures, a committee on which Dr. Fekken participates. Dr. Cronshaw explained that what the Board gathers and calls "criteria" are what industrial psychologists call "knowledge skills and abilities and other individual differences that are thought to be related to job performance." He says these are then built into the interview process to predict job performance. He says, "Questions are developed around these and the interview becomes a predictor" of what would be the candidate's performance as a vice-principal. He also describes these as a key element of job analysis. Thus, he is not as troubled as is his colleague Dr. Fekken about the absence of a formal job analysis here. While there are acceptable models of formal job analysis which he acknowledged in cross-examination, Dr. Cronshaw felt that the Board's method of gathering the "criteria" from the three groups could be considered as a type of job analysis when it is combined with the superintendents' knowledge of the job through performance reviews and evaluations.

(C) THE EXPERTS' OPINIONS OF THE INTERVIEW AS A SELECTION TECHNIQUE

[76] All the parties brought forward experts to comment on the validity or appropriateness of the interview for the selection of vice-principals. Professor Fekken describes the conventional wisdom as viewing interviews *per se* as "relatively

weaker than a variety of other personnel selection techniques . . . such as structured cognitive ability tests." However, she acknowledges a recent trend in studies indicating that "interviews may in fact be valid in general. But they are most likely to be valid if . . . they are structured." She describes the dangers of an unstructured interview as being susceptible to the "halo effect," and the "contrast effect" or the "stereotyping effect" where particular characteristics such as colour or size of an individual is used to stereotype the candidate. To avoid these dangers she requires a "structured interview format" which involves:

- (a) asking the same questions of all the candidates;
- (b) a systematic evaluation method for deciding whether candidates meet the criteria; and
- (c) trained interviewers who are alerted to the potential of the halo, contrast and stereotype effects and who focus on the qualities of the criteria which they are supposed to assess.

Dr. Hickox testified that it is a "violation of good practice if the interview is the only source or the major source of information used to make up a decision." He adds, "I am in favour of multiple sources of information of which the interview is one, but only one."

[77] The Board of Education's witnesses agree that a structured interview is necessary in a valid selection technique. However, they placed a higher value on the interview *per se* and were more at peace with the type of interview conducted by the Board. Dr. Leithwood testified that studies accept the interview as an effective and critical source of information for the decision-makers in the context of selection of a vice-principal. He was quite specific:

Procedures that have been used in the interviews we might defend as quite relevant as ways of getting information for all the criteria, but the main thing that concerns me is their appropriateness for two of the criteria in particular the "building and maintaining interpersonal relationships" and "effective communication." And the reason I focus on those is because an interview provides the most direct evidence I think that is possible of whether or not a person is capable of engaging in those kinds of behaviour or practices . . . School administrators spend an inordinate amount of time in face-to-face contact with other people and may find themselves in interview-like situations many times during the course of a day with a group of parents that have a concern about some of the school's programmes, with a parent who is angry with the placement of his/her child, with a teacher who is upset about some aspect of their assignment or what they are doing in the school and I think, that is part of the role demands, that a person delivers good interpersonal skills and effective communications reliably in almost every circumstance they find themselves. It's kind of a basic skill I take of administration and I think for that reason we have a right to expect a person to be able to deliver evidence of possessing these two sets of qualities in an interview setting which is not terribly different from the kind of setting he might face in their own school. Many of the circumstances a principal finds himself in would be tension-provok-

ing. . . . It's difficult for me to imagine a way of collecting information that provides more direct evidence of whether or not a person possesses these qualities.

Dr. Leithwood conceded in cross-examination that direct evidence of performance in a particular context such as a teacher-to-teacher relationship or a teacher-to-student discussion would be "better evidence than an interview situation." However, his evidence, on the whole, stresses the validity of the interview as a selection technique.

[78] Dr. Stephen Cronshaw also testified for the Board of Education. Dr. Cronshaw sees two goals to his study and application of industrial organizational psychology. One is to increase productivity, by selecting the best person for the job. The second is to ensure human rights compliance. His research leads him to the opinion that structured interviews will not necessarily disadvantage qualified minority group members. He reaches this conclusion after an extensive computer search of studies investigating race discrimination in interviews. The literature is mainly American and deals with the experience of blacks in the United States. There are no studies of South Asians in the job interview context in Canada. The result of this research leads Dr. Cronshaw to conclude that interviews are "highly predictive of job performance" in comparison with other selection techniques. Dr. Cronshaw considers that the Toronto Board's interview techniques can be considered those of a structured interview. He bases this on his understanding that the questions were based on the "job analysis information" gathered from the students, principals and teachers, indicating the skills and abilities required by the vice-principals to perform the job. Further, he considers the making of the decision on the basis of consensus to be an "element of structure" and "produces a more valid decision." Other elements of structure he credits to the Toronto Board's interview process are:

- i. Asking the same questions of all the candidates in the same order.
- ii. keeping notes
- iii. discussing criteria prior to the interview
- iv. developing questions prior to the interview
- v. screening out potentially discriminatory questions such as age
- vi. giving selection criteria to candidates before the interview
- vii. reaching decisions by going round and round
- viii. deciding on the basis of consensus.

Thus, Dr. Cronshaw is prepared to characterize the interviews in this case as "structured interviews" and as a valid selection technique.

6. South Asians

(A) WHO ARE SOUTH ASIANS?

[79] As this is an allegation of constructive discrimination having an adverse impact on South Asians, all parties brought forward expert evidence on the issue of what comprises the geographic area of South Asia, who are South

Asians and what, if any, common characteristics are shared by South Asians.

[80] There is some difference between the parties as to what comprises the South Asian cultural area. Mr. Bhadoria and the Human Rights Commission would confine it to India, Pakistan, Bangladesh and Sri Lanka. The Board of Education's expert on South Asia, Dr. Ajit Ray, an anthropologist, describes a wider and academically accepted notion of South Asia consisting of ten countries, namely,

India	Nepal
Pakistan	Bhutan
Bangladesh	Sikkim
Sri Lanka (Ceylon)	Mauritius
Afghanistan (in part)	Maldives Islands

The debate between the experts and the parties is intellectually interesting, but of little importance to the issues at hand. Whether there are four or ten countries within what one should accept as a "cultural area," all expert witnesses on the subject and the literature filed in evidence before me acknowledge that within South Asia, no matter how broadly or narrowly defined, one can find millions of people, hundreds of languages, a wide variety and number of religions, various levels and degrees of technological development, and wide variations in social structures. All those things are the hallmarks of what anthropologists and sociologists accept as "culture." Therefore, the question arose in our proceedings as to whether you could define South Asian cultural characteristics in so diverse a population and so widespread a geographic area, no matter how it is defined.

[81] In examining this, the evidence of Professor John Berry was very helpful. He is a professor of psychology at Queen's University in Kingston with three main specialties: cross-cultural psychology, social psychology and ethnic relations. He describes these fields as follows:

Social psychology is a branch of the discipline of psychology that tries to understand individual behaviours and experience in relation to the social context in which individuals grow up and in which they carry out their lives.

Cross-cultural psychology is . . . another sub-discipline of psychology in which we try to understand people, not only in our own culture, but people who live in other cultures as well.

The study of ethnic relations is a study of the attitudes, behaviours and practices that exist between culturally or ethnically different groups of people.

Within the field of cross-cultural psychology, his particular specialties are:

the attempt to relate the psychological characteristics of individuals to the cultural context in which they have developed. The secondary is to establish the appropriate ways in which assessment of those psychological characteristics can be carried out validly and reliably in other cultures.

One of the purposes of Dr. Berry's work is to try to establish links between the behaviour of individuals and the "cultural characteristics" of the group to which they belong. He ex-

plained and demonstrated how the literature in the relevant fields acknowledges the concept of a South Asian cultural area. He went on to describe what he defines and is recognized as the "common cultural characteristics of the South Asian cultural area."

Perhaps the most readily distinguishable feature of the South Asian cultural area is the social system that is recognized I think as the most stratified form of social organization that one can find. By stratified, I mean that many distinctions are made amongst members of the community, of the society, and these distinctions are placed in a rather rigid hierarchy or vertical structure, the structure of rank and of place and privilege, one above the other. This is perhaps best known to us by what is the epitome of this system, the caste system, which since independence is formally illegal in India and formally has no place . . . but which is easy to recognize and is well described as a fact of life in these areas. This hierarchy is one that is condoned by social values and religious beliefs. It is transmitted by birth. One is born into one's rank with very little opportunity to change what we would call social upward mobility.

There is a second characteristic that I think is shared broadly throughout the area, and this is a characteristic which has come to be known as collectivism. Collectivism is a quality of populations and with individual members of those populations that contrast with individualism. So you often see individualism-collectivism as a dimension along which people can vary. In collectivism the primary orientation is towards the group to which one belongs, the acceptance of responsibilities towards this group, the acceptance of the norms and the standards of the group and, in essence, the acceptance of the group as the important unit in one's life. In contrast to the individualist orientation, which we are all very familiar with in Western culture where the I or the me or the single person is the most important unit, and our recognition of responsibility of our family in our community is considerably less developed. In the South Asian cultural area, a number of studies have shown both in community life and in the world of work, that people are among the most collectively oriented of those studied in cross-cultural psychology. They looked to the group for their support, for their definition of themselves, and in a sense would subscribe to the idea that they are nothing without the group. . . . In the jargon of cross-cultural psychology there is a distinction made between "in-groups" and "out-groups." The in-group is typically the family, one's peers, the group that one interacts with on an intimate day-to-day basis and the out-group or out-groups more accurately are those which are outside the specific in-group. One of the characteristics of the collectivist orientation is that one will relate intimately, deeply, with a great deal of baring of the chest and the heart in the in-group but generally will be far less open with the out-group members. In contrast, in more individualistic cultures, individuals will make much less of this distinction between in-group and out-group and probably make fewer changes in one's behaviour, depending on whether one is interacting with an in-group member or an out-group member than would a member of a collectivist culture.

One of the features of the South Asian diaspora, which is not dissimilar to the Jewish diaspora, is a substantial amount of cultural retention even though they are thousands of miles away. Language, religion, dress, food and a sense of belonging to the South Asian community has tended to remain in place over all these generations.

Dr. Berry stressed that he was not trying to talk about racial "types" or "stereotypes." As he explained, "stereotyping is the act of believing that everyone in a group shares a relatively small number of characteristics, very often characteristics which are being denigrated by the person who holds the stereotype." He further explains:

The idea that there is a racial type, or a cultural type or a typical member of that type, flies in the face of what is now widely known and that is that there is a widespread variation within any population. . . . So I agree that there is no South Asian type, no typical South Asian, but there are some central tendencies which allow us to make scientific generalizations about population. [Emphasis added.]

Thus, in summary, Dr. Berry's evidence was offered to explain that there is a recognized concept of cultural characteristics that, when studied in the context of the South Asian cultural area, lead to the conclusion that there are two distinct and important cultural characteristics of the South Asian population. These are the tendency to be "hierarchical" and to be prone to "collectivism."

[82] This evidence was countered by Dr. Ajit Ray, an eminent South Asian scholar and professor of anthropology at the University of Toronto. His specialty is physical anthropology and he has studied in and about South Asia for all his professional life. His evidence stressed the concept that it is impossible to ignore the extremely multi-faceted nature of the widespread geographic area of South Asia encompassing millions of people and so many religions, languages, technologies and social structures. In particular, he stressed the differences even in India between rural and urban populations. He suggests that Dr. Berry's analysis of South Asian culture amounts to stereotyping the South Asians in ways that are neither appropriate nor well founded. Dr. Ray says that you cannot define South Asian culture:

. . . because of the diversity of the languages, the diversity of the racial groups, diversity of genetical isolation, hundreds of thousands. How can you have a tie when you have different kinds of colours and all those things, heterogeneous elements. . . . You are talking about different stratifications of the caste system in a particular locality. You are talking about national boundaries, you are talking about state boundaries and you have many aboriginal populations in between. There is a wide range of variation and culture, in language, in educational system, in background, a wide range of variations and still you want to see us as a South Asian? Why? Your whole concept is a typical concept which Darwin denied again and again. It should be a population concept—That is variation is the reality, type or mean or average is just illusion.

Thus, we have one expert identifying and explaining cultural characteristics of South Asians. We have another expert saying that the exercise is futile and inappropriate.

(B) CULTURAL BIAS AND ITS EFFECT UPON THE SELECTION PROCESS

[83] The Human Rights Commission brought forth evidence from Dr. Berry about the concept of "cultural bias" in assessment techniques. The literature shows that assessment instruments developed in one country by members of one culture are reflective of that culture's assumptions, beliefs and points of view. Thus, they may not provide a "good match" with the one cultural characteristics or qualities in a different culture. Further, it is problematic to tell whether different assessments of two cultures are a result of differences in what is being measured or whether it is simply a reflection of cultural differences.

[84] Dr. Berry's evidence in this area suggests that the South Asian "hierarchical style" results in one being deferential and formal to people in authority. Thus, a person with South Asian cultural characteristics would treat an interview as a formal situation calling for the interviewee to conduct himself/herself with deference and formality. In turn the interviewer, in a Toronto setting, would view the South Asian applicant as unduly restrictive, formal and unable to communicate openly and freely with others. Dr. Berry explains:

Without specific training and experience, people who are asked to make judgments are not necessarily going to be able to recognize psychological qualities in people of another culture. I mention the example of sense of humour, but it applies to such things as empathy. How would I, without training and knowledge and experience, know when a South Asian person has empathy? And I believe there is a general problematic context that South Asians have to be viewed in. . . . There are two facets that I think are specific to South Asians, one has to do with the hierarchical character of South Asian social system . . . and the other has to do with the collectivist nature. . . . This hierarchical style is not only suitable but is almost necessary for individuals who live in a stratified system. This hierarchical style involves deference towards and formality towards people who are accepted by one as higher than oneself in the hierarchy. One is deferential to their knowledge, their status, their authority, their position and one treats people higher in this hierarchy with respect and with formality. Now as I say, this is entirely appropriate and functional in the stratified system that one finds in South Asia. In Canada we are substantially less stratified in this way and so what for a Canadian might be viewed as somewhat as even a minimally formal situation, such as an interview, this is likely to be construed, in my view, as a very formal situation by a person of South Asian heritage leading to proper behaviour. . . . Proper is defined by their norms leading to deference, leading to formality, having the person come across in the interview simply as a result of being South Asian and behaving in this hierarchical style, having this person viewed as unduly restricted or formal, not able to communicate openly and freely as a person who is from some other cultural background might expect themselves. So I think that the interview situation is likely to be construed as a situation in which the life-long pattern of deference and formal relationships is appropriate and judgments are likely to be made about that person's be-

haviour which makes that person look as if they are lacking in presence, or unable to project themselves personally or not outgoing and so on, just to anticipate some of the criteria we have before us.

Dr. Berry explained that this type of conduct may not be found outside the interview context because the candidate would deal with peers and colleagues, such as fellow teachers and fellow committee members, without the perceived need for deference.

[85] Similarly, Dr. Berry suggests that the literature on South Asian cultural tendencies towards collectivism indicates a reluctance or reticence to reveal information to people with whom they do not have an intimate relationship in their "in-group." This causes the interviewee to be less forthcoming, less revealing, less spontaneous and more constrained in his/her answers. This would cause difficulties for a South Asian to appear to meet the criteria of "being willing to participate in a two-way communication" and being "open-minded, outgoing, flexible."

[86] The difficulties of cross-cultural assessment and appreciating cultural characteristics in another group were highlighted in the use of criteria such as "sense of humour" and "having a personal presence" and being "understanding and empathetic." As Dr. Berry explained:

... a sense of humour, for example, is almost the prototypical example and yet it occurs often in the criteria, of a quality that is thought to vary from one culture to another. The British have no sense of humour, according to those who are not British. The British are the funniest people in the world according to the British. These differences in what we mean by "sense of humour," how we express and how we recognize it, are in many cases extremely culturally variable. So when we have criteria, they are open not only to cultural differences and interpretation. So when the criteria are applied to people of other cultures, the person may have in his own view and in the view of his own community, he may be the funniest person around but be considered to be without a sense of humour by people who are not members of his own culture. But there is another feature of the vagueness that is also worrisome, that is when the criteria are vague, subjectivity can provide the meaning. We can allow our own preferences, our own opinions and prejudices to enter into the determination of what the criterion means. . . . In cross-cultural assessment, if, in general, people who belong to a particular group are not admired or indeed are generally disfavoured or are objects of prejudice, then this kind of negative halo can affect the judgments made in relation to these vague criteria. For South Asians, in my judgment, this is a particularly serious matter, because of the studies which have demonstrated that South Asians are amongst the least admired sector of the Canadian population.

Dr. Berry also suggests that a South Asian might be disadvantaged by a criterion demanding that s/he be "accessible to students" because studies show that Canadians tend to distance themselves from and have an attitude of dislike towards South Asians. He cited a number of studies which have demonstrated that South Asians are amongst the "least

admired sector of the Canadian population" and are perceived to be "the least familiar" to the mainstream of English and French Canadians. These studies also reveal that South Asians are rated the lowest for qualities such as "being Canadian," "being clean," "likeability" and "similar to me." Dr. Berry describes these studies as establishing South Asians as a group that are being stereotyped as "not known, not liked, not Canadian and not us." However, as frightening and revealing as these general studies are, there have been no specific studies of how South Asians perform in job interviews in Canada.

[87] Dr. Rudolph Kalin, the Head of the Psychology Department at Queen's University testified about a study he conducted to observe the effect of accent in a job selection context. The "interviewers" in the study were university students and they would be expected to be more tolerant in racial attitudes than the population at large. The study shows that South Asians were rated most appropriate for only the lowest status jobs where the only variable between the applicants was accent. The study showed the potential of "drastic biases" in an unstructured job selection process.

[88] Finally, these generalizations about the stereotypical perceptions of South Asians must be tempered by Dr. Berry's acknowledgment that people of higher education, higher occupational job status, higher income levels and coming from the city of Toronto have a more tolerant and open attitude than the Canadian population as a whole towards people not within their own group. Further, studies have also shown that a "more positive attitude towards ethnic groups" is fostered by those being charged with the responsibility to implement a race relations policy.

(C) EVIDENCE OF DISADVANTAGE TO SOUTH ASIANS

[89] The next question to address is whether there is evidence of disadvantage to South Asians in this case. Setting aside the situation of Mr. Bhadauria for the moment, one must look at the rest of the evidence. The Human Rights Commission cites several instances of what it suggests amounts to evidence of discrimination to other South Asians by the process under scrutiny here. One of these people is a person who was appointed to a vice-principalship after 1984. Mrs. Banks describes this South Asian applicant as having told too many things and not being specific and clear. However, such a fault seems inconsistent with the notion of reticence ascribed to the South Asian tendency of collectivism. She described another South Asian candidate who was ultimately successful as having difficulty giving enough information. This is consistent with collectivism. But we have no evidence of the overall personality of that applicant or the degree to which he can be attributed to have South Asian cultural characteristics, or the extent that his initial difficulties in an interview situation can be ascribed to cultural characteristics. Neither of these two gentlemen was called as a witness by either party.

[90] The Human Rights Commission sought to introduce, through cross-examination of Board witnesses, documents penned by South Asian teachers, which dealt with perceptions of difficulties voiced by South Asians in the Board's

promotional policies. Given that these documents or their authors were not offered into evidence as part of the Human Rights Commission's or Mr. Bhadauria's case-in-chief, and given the inability of the Board to cross-examine upon such evidence, the documents were not admitted as evidence for the truth of their content. Indeed, the documents themselves were not admitted into evidence. Although under certain circumstances their contents were read to witnesses for their comments. The reasons for allowing and disallowing the admission of the evidence of those documents were given in detail to the parties in the course of these proceedings and need not be repeated here. However, there was evidence through other witnesses and through admissions by Board representatives that the Board had received expressions of concerns from the South Asian community and these teachers about the Board's promotional processes. However, the Board did not interpret this to mean that there were intrinsic flaws in the promotional process or that there was a problem of constructive discrimination against South Asians. Instead, the Board perceived the problem to be a lack of self-confidence of aspiring candidates. Thus, the Board received and used these expressions of concern as an impetus to develop training programs and mechanisms to build higher self-esteem and interview skills for visible minorities in general, rather than South Asians in particular in late 1984 and early 1985.

(D) ADVERSE IMPACT—STATISTICAL EVIDENCE

[91] One cannot look to statistics to either prove or disprove a case of adverse impact. Yet, statistics can be helpful in assessing the situation in question.

The parties did not put together the statistics on the number of applications, pre-interviews and interviews of all the candidates for vice-principal in the relevant 1981-84 period. This was also refined to list the number of South Asian applicants and how they fared in comparison to the group as a whole. The purpose of this was to illustrate the relative success of South Asians and non-South Asians in the application process. The calculations were done on two bases, one showing no successful South Asian candidates in the relevant time frame and one showing a successful South Asian candidate. The reason for the difference was the dispute between the parties over how to characterize one person, Usha Finucane, who was promoted to the vice-principalship in 1982. Mr. Bhadauria had initially characterized her as South Asian in his materials submitted to this inquiry. However, the Human Rights Commission took the position at this hearing that Mrs. Finucane should not be considered South Asian in terms of the "cultural and ethnic characteristics" described as the central tendencies mentioned by Dr. Berry. Simply put, the Human Rights Commission took the position that Mrs. Finucane did not display any of these cultural characteristics and should therefore not be considered as South Asian for purposes of the statistical analysis.

[92] Mrs. Finucane testified on behalf of the respondent and voiced controlled, articulate, and yet enraged, indignation over the fact that her heritage had become an issue in this hearing. Mrs. Finucane is the daughter of an Irish mother and a South Asian father. Her father was born and educated

in India. However, she was born in Wales and is married to a man of Irish heritage. Extensive evidence was elicited from both parties as to Mrs. Finucane's upbringing, childhood, accent, education, spouse, children's names, social contacts, dress, religion and her projected image. She is a remarkably accomplished and intelligent woman. It is small wonder that she has become a vice-principal. She is a very impressive person. She must bring a wealth of assets to the schools where she functions. However, insofar as her heritage is concerned, it is best to let her speak for herself as she said:

How can anyone deny something that I am? My father is Indian. I am Indian, my children are Indian. It's part of my heritage. It's not something I can deny, and it's not something I would deny

Regarding the position taken by the Human Rights Commission she said:

I can't believe that an organization such as the Human Rights Commission would say something like that, without knowing who I am. What right do they have to state that I am not what I am? They have never seen me before, so how can they make a judgment on me! I am so angry, outraged

So without doubt, Mrs. Finucane considers herself as Indian and as South Asian and would be outraged if this is not respected by others. On the other hand, the Human Rights Commission is prepared to acknowledge Mrs. Finucane's heritage, but suggests that she lacks sufficient South Asian factors in her persona, such as accent, religion, education and geographic origin. It was said that this results in her not having the South Asian central tendencies that would attract the adverse impact of the Board's policies.

[93] In the context of the debate, the following statistics were offered about the number of applications:

(i) Not Including Mrs. Finucane

	Number of Applications	Number of Pre- Interviews	Number of Interviews	Selected
Non-South Asians	1,134	256	129	35
South Asians	<u>83</u>	<u>8</u>	<u>2</u>	<u>0</u>
Total	1,217	264	131	35
South Asian %	6.82	.66	.16	.00
Non-South Asian %	98.18	21.04	10.60	2.88
Total number of Applicants				131
Number of South Asian Applicants				6
Number of Non-South Asian Applicants				125
% of South Asians				4.58
Selected South Asians				0
Selected Non-South Asians				35
% of South Asians Selected				.00
% of Non-South Asians selected				28.00

(i) Including Mrs. Finucane

	Number of Applications	Number of [Pre-] Interviews	Number of Interviews	Selected
Non-South				
Asians	1,131	253	26	5
South Asians	<u>86</u>	<u>11</u>	<u>5</u>	<u>1</u>
Total	1,217	264	131	36
South Asian %	7.07	.90	.41	.08
Non-South				
Asian %	92.93	20.79	10.35	2.88
Total number of Applicants			131	
Number of South Asian Applicants			7	
Number of Non-South Asian Applicants			124	
% of South Asians			5.34	
Selected South Asians			1	
Selected Non-South Asians			35	
% of South Asians Selected			14.29	
% of Non-South Asians selected			28.23	

[94] Adverse impact has and can be detected with the help of statistics which indicate the success, or lack thereof, of obtaining the goal of equal opportunity or representation of minority groups. Statistics can tell us whether there is a differential impact of personnel selection procedures on two groups. But Dr. Fekken explained that the small number of South Asian applicants and successes here make it difficult to apply statistics "meaningfully." To achieve "statistical significance," the number of applicants would have to be larger and the number of successful applicants would have to be at least five. Formulas are available to determine the statistical acceptability of the figures. All the experts agree that the number of applications and successes here are too small to be of great value to us.

[95] However, Dr. Fekken did proceed to explain and apply the commonly accepted "four-fifths rule" to the facts available. This rule is applied in discussions of adverse impact and states that the selection rate for one sub-group should be at least four-fifths of the selection rate for the other sub-group. Dr. Fekken concludes that 22 to 23 percent would be the selection rate one would statistically anticipate in a pool of six or seven South Asian applications. Thus, one would expect one or two South Asians to be selected. This is why the status of Mrs. Finucane was important to the parties. If Mrs. Finucane is included in the "pool" of South Asians the Board can be seen to have put itself within the range of statistical acceptability by having one successful application in a pool of seven. On the other hand, if Mrs. Finucane is not put in the pool of "South Asians," there are no successes in a pool of six and the result would appear to suggest an adverse impact on the South Asian applicants. However, it is readily acknowledged by the Commission and Mr. Bhadauria that this is not conclusive evidence of adverse impact because of the small size of the samples available. But the Commission asks that "substantial weight" be given to this evidence.

(E) FURTHER STATISTICS

[96] Other numerical information is relevant. In the time period covered by this complaint, 124 people applied to fill the 35 vice-principal vacancies. Mr. Bhadauria applied 39 times. No one else applied so many times. Yet others were close. One person applied 37 times, received two pre-interviews and one interview, but was not successful. There are numerous others who applied more than 30 times and did not succeed. Some of the successful candidates made more than 20 applications. No one other than Mr. Bhadauria was pre-interviewed four times and did not progress to a final interview. However, one person was pre-interviewed three times after 28 applications and also never got to the final interview.

[97] Further, from data collected in a 1980 "Grade Nine Student Survey" and a Survey of Racial Minority Employees in the Spring of 1982, the following picture emerges:

	Number of Employees*	Number of Students*
Black	217 (2.6%)	473 (6.7%)
Asian (including South East Asian)	265 (3.1%)	851 (12.0%)
South Asian	98 (1.2%)	134 (1.9%)
Canadian Inuit/Indian	5 (0.05%)	47 (0.7%)
Unspecified Other	81 (0.9%)	303 (4.3%)
Total Visible Minority	665	1,761
Total Number	8,404	7,065
% Visible Minority of Total	7.9	25.6

* [It may be noted that the calculations of the totals in each category are not arithmetically correct. However, the figures are taken verbatim from the Board's study.]

The same surveys revealed that regarding positions of responsibility South Asians occupied 10 out of a total of 1,251 positions for a total of .799 percent.

7. The Argument

(A) THE COMPLAINANTS' SUBMISSIONS

[98] The position of the Human Rights Commission is that the vice-principal selection procedures used by the Toronto Board of Education had the effect of excluding South Asians or preferring non-South Asians. It was said that South Asians were assessed in an interview where, by reason of their general cultural characteristics, they were less likely to demonstrate the criteria the Board was looking for, even though those criteria could be seen outside of the interview context. Further, it was said that South Asians were disadvantaged because the selection criteria were vague, subjective and

allowed for the operations of widely held negative views of South Asians in our society.

[99] Counsel for the Human Rights Commission, Ms. Jackson, reviewed the Toronto Board's vice-principal selection procedures critically. Of specific importance was her submission that the area superintendents did not formulate or operate from a common understanding of the criteria for selection or with a common assessment standard, either at the pre-interview or the interview itself.

[100] In this context, the Commission stressed the cultural characteristics of South Asians, being tendencies towards hierarchy in social structures and collectivism with members of the in-group. It was admitted that not all South Asians exhibit these types of behaviours all the time because behaviour depends on the formality of the situation, different circumstances affect behaviour and not all South Asians exhibit central tendencies to the same degree. However, the concern of the Commission stems from the phenomenon described by Dr. Berry that one culture will assess another culture differently. Thus, South Asians will perceive an interview as extremely formal and be very deferential and reticent. They will have difficulty projecting an image of openness and having [the] ability to communicate. These were qualities which the Toronto Board of Education was seeking in its search for vice-principals. On the other hand, the South Asian could exhibit these same qualities outside of the interview when working with his or her colleagues and students in a less formal setting. The Commission's concerns are increased when viewed in conjunction with Dr. Berry's and Dr. Kalin's evidence that most people in Canada view South Asians as "distant and removed," and that untrained interviewers have difficulty recognizing behaviours cross-culturally. Finally, South Asians are not likely to display a desired characteristic because of their hierarchical and collectivist central tendencies. Some criteria were singled out as particularly open to these problems such as being "accessible to students," "having a sense of humour and having a personal presence."

[101] The Human Rights Commission and Mr. Bhadauria's counsel, Mr. Page, stressed the fact that outside the interview context, Mr. Bhadauria was credited with the qualities desired by the Board by his fellow teachers and by supervisory staff. However, in the interview, Mr. Bhadauria did not project these qualities. Thus, it was argued that the interview structure had the effect of discriminating against him and other South Asians because their South Asian central tendencies prevented them from either performing or being perceived to be able to perform in the way the Board wanted.

[102] All the expert evidence was summarized by the Commission to seek to establish that the selection process was based on "vague and subjective criteria" that were assessed in a vague and subjective way that disadvantaged South Asians because they allowed for the intrusion of non-job-related prejudices against them, put too much focus on the interview to the exclusion of other relevant information, and hurt South Asians whose behaviour at the interview was influenced by collectivism and hierarchy. Instead, the Human Rights Commission argued that the selection should be

based on well-defined and understood job-related criteria, based upon a standard that was defined, objective and agreed upon in advance. It was said that the Toronto Board's procedures lacked these requirements and thus can be considered to be susceptible to bias, the halo effect and the contrast effect. The evidence of Drs. Berry, Fekken and Hickox was cited as exposing the errors in the Toronto Board's process and the ways it ought to be improved. Further, the evidence of the Board's supervisory officers was analyzed to support the submission that their assessments were made on vague, subjective and global bases.

[103] Taking all this theory in the context of the case, Mr. Page then addressed the situation of Mr. Bhadauria, with some caveats. It was stressed that the 39 applications ought to be assessed in light of the time period in which they occurred and not influenced by any events which occurred afterwards. Further, Mr. Bhadauria ought to be assessed on the basis of his achievements and behaviour up to 1984 in order to judge him fairly and accurately. In that light, it was stressed that the Board itself viewed Mr. Bhadauria capable of being a vice-principal because he was accepted in the vice-principals' course and short listed on at least four occasions. Then, it was argued that the pre-interviews did not fairly reflect Mr. Bhadauria's true qualifications and personal qualities because his performance was impaired by his cultural tendencies. The result of this was said to be his disqualification from the promotional process despite his qualification to be a vice-principal. Counsel stressed the many positive assessments of Mr. Bhadauria as an educator and a colleague throughout his years with the Board in contrast with the poor evaluations of him at the interviews. It was argued that Mr. Bhadauria's birth, upbringing and education resulted in him reflecting the central tendencies of the South Asian culture and affected his performance at the interviews. It was said that the supervisory officers' assessment of Mr. Bhadauria as not demonstrating warmth and openness or sense of humour was proof of the effects of his central tendencies both influencing the superintendents' perceptions of him and the difficulties in making cross-cultural assessments. Thus it was said that the pre-interview was not a fair assessment of Mr. Bhadauria as a vice-principal and that it acted as a "complete block of upward mobility in the promotional process." Mr. Page calls this "the invisible glass wall" that Mr. Bhadauria hit in his quest for promotion. The proof offered was again the "striking differential" between the assessments of Mr. Bhadauria outside and inside the interview context that the Human Rights Commission and Mr. Bhadauria attribute to the failing of the interview in the cross-cultural assessment process. Counsel for the Human Rights Commission also attacks the Toronto Board of Education for its poor implementation of the race relations policy and its lack of responsiveness to expressed concerns in late 1984 and 1985. It was said that the Board displayed a lack of sensitivity and commitment that are necessary for an "effective race relations policy."

[104] The Human Rights Commission also criticized the Board for its conduct in this case. Several problems were mentioned including Mr. Hayes' unwillingness to discuss a human rights complaint with Mr. Bhadauria, the inaccuracies in Mr. Bell's opening address to this Board of Inquiry and the

"wide ranging, hard hitting and frequently unsubstantiated attacks" on Mr. Bhadauria in his cross-examination. Further, the failure of Board witnesses to retain notes and of the Board to produce complete records until well into this hearing were criticized and said to be indicative of the Board's lack of sensitivity to this process. I was also asked to draw an adverse inference from the failure of the Board to call Mrs. Sissons and Mr. Turner to testify. Mrs. Sissons was the superintendent in charge of personnel selection and the "leader of the process" who participated in the pre-interviews. Her witness statement described Mr. Bhadauria's approach to the promotional process as a "product of colonial upbringing in India." Mr. Turner was an area superintendent who described decisions made at interviews as "basic," "subjective" and an "animal thing" in his witness statement.

[105] As to other evidence of discriminatory effect, the Human Rights Commission explains that the expert evidence should lead to the conclusion that the number of South Asian applicants and successes here are too small to be of any statistical significance despite the number of years South Asians have been in the system. The fact that Mrs. Finucane succeeded was said not to mean that there is no disadvantage to South Asians. Instead, the evidence was said to show only that she did not have the disadvantages because of her different upbringing and cultural background and did not develop the hierarchical and collectivist tendencies.

[106] On behalf of Mr. Bhadauria and the Commission Mr. Babin presented legal argument to support the claim based on s. 10 of the Code. The "special nature" of human rights legislation was stressed with the need to interpret it as fundamental law which is quasi-constitutional in nature. *Action travail des femmes v. Canadian National Railway Co. (sub nom. Canadian National Railway Co. v. Canada (Canadian Human Rights Comm.))*, [1987] 1 S.C.R. 1114, 8 C.H.R.R. D/4210, and *Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 7 C.H.R.R. D/3102. It was argued that this inquiry should not look to the intent of the respondent, but instead to the result or the effect of its promotional policies as dictated by s. 10 and the preamble of the *Human Rights Code* and the *Interpretation Act*, R.S.O. 1980, c. 219, s. 10 and *Action travail*, *supra*, and *O'Malley*, *supra*. In that light, it was said that Mr. Bhadauria's assessment at the interviews disadvantaged him because of his race, ancestry, place of origin, colour and ethnic origin. Further, it was submitted that as this is a complaint of constructive or systemic discrimination, the examination process should be two-step whereby the complainants are called upon to show a *prima facie* case of discrimination by the means and the grounds alleged. Once that is accomplished, the respondent is only able to defend by establishing that the impugned procedures and practices are reasonable and *bona fide* requirements in the circumstances. It was said that this requirement includes the burden of establishing that less discriminatory practices and procedures could not have been used without causing undue hardship. Reliance was placed on *O'Malley*, *supra*, and *Chrysler Canada and U.A.W.* (1986), 23 L.A.C. (3d) 366 (Kennedy), *Malik v. Ontario (Ministry of Government Services)* (1981), 2 C.H.R.R. D/374 (Eberts) and *Griggs v. Duke Power Co.*, 91 S.Ct. 849, (1971). It was accepted that the complainants must show from all the

surrounding circumstances that the practices and the procedures of the respondent Board disadvantaged persons of the same race, colour, ancestry, ethnic origin and national origin as Mr. Bhadauria. It was argued that the evidence about Mr. Bhadauria and about South Asians' cultural characteristics establish that South Asians are disadvantaged in the interviews for vice-principal. Reliance was placed on *Dhaliwal (No. 1) v. B.C. Timber Ltd.* (1983), 4 C.H.R.R. D/1520 (B.C. Bd. Inq.). This Board of Inquiry was urged to give weight to the evidence of the social scientists given the "inherent social" nature and purpose of the *Human Rights Code* as recognized in *Dhaliwal (No. 1)*, *supra*, and *Quereshi v. Toronto (City) Bd. of Education* (1989), (Ont. Bd. Inq., Ratushny) [unreported]. I was reminded of a policy of multiculturalism accepted by all levels of government, including the Toronto Board of Education, which demands equal access to employment and promotional opportunity without discrimination and as codified in the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 27, the *Canadian Multiculturalism Act*, R.S.C. 1985, (4th Supp.), c. 24 and the *Ministry of Citizenship and Culture Act*, 1982, S.O. 1982, c. 6. Cases were cited in which vague, discretionary and subjective selection practices were subjected to strict scrutiny under human rights legislation. *Quesheri*, *supra*; *Mears v. Ontario Hydro* (1983), 5 C.H.R.R. D/1927 (Zemans), *Antonio et al. v. Wards Cove Packing Company Inc.*, 810 7 Rep. (2d) 1477 (1987) and *Rowe v. General Motors Corporation*, 457 F. 2d 348, (1972). It was submitted that the expert evidence in this case goes beyond previous cases in exposing the particular consequences to South Asians and amounts to evidence of adverse effect within the meaning of s. 10. It was argued that the Human Rights Commission and Mr. Bhadauria need not show that he would have succeeded in any application for vice-principal, just that he show a *prima facie* case of disadvantage. See *Quereshi*, *supra*; *Dhaliwal (No. 1)*, *supra* and *Hung Ping Wang v. Hoffman et al.*, 694 S. 2d 1146 (1982). To this end, it was said that the statistics should be given "substantial weight." See *Dothard v. Rawlinson*, 433 U.S. 321 (1977). We were advised not be concerned about the absence of "statistical significance" which is a scientific, not legal, standard. It was argued that no undue standard of proof should be imposed so as to deprive a person in a small group of applicants of a chance of success.

[107] While the employer can defend by proving the practice or procedures are reasonable and *bona fide*, it was argued that this should not destroy the goal of preventing discrimination. See *Action travail*, *supra*, and *Air Canada v. Carson* (1985), 18 D.L.R. (4th) 72, 6 C.H.R.R. D/2848 (F.C.A.). It was argued that the procedures used here were not related, in an objective sense, to the successful performance of a vice-principal and were not reasonably necessary to ensure the proper performance of the job. The evidence of the respondent was said to be insufficient to establish a defence in that it was impressionistic, the procedures were merely convenient for the employer and that it failed to establish that less discriminatory practices could not have been used without undue hardship.

[108] By way of remedy, the Commission and Mr. Bhadauria asked for an exercise of broad remedial powers under

s. 40(1) of the Code. The order sought was as follows:

1. A declaration that the selection procedures for filling vice-principal vacancies in use by the Toronto Board of Education between 1980 and 1984 constructively discriminated against the complainant as an applicant of South Asian origin;

2. An order that:

(a) the Toronto Board of Education establish a committee to establish new selection procedures for the filling of vice-principalship positions within the Toronto Board of Education secondary school system;

(b) the committee include in its membership an expert in personnel selection procedures from outside the Toronto Board of Education an expert in cross-cultural or race relations and in the effect of employment procedures on minority groups, which expert should also come from outside the Toronto Board of Education, a representative of the Ontario Human Rights Commission, and community representation;

(c) the committee be directed to establish a selection procedure which is valid and reliable, using well specified job-related criteria, using multiple sources of information for the selection procedure, and incorporating interview and cross-cultural training for those involved in the selection process if the interview remains as a part of the process;

(d) that the Toronto Board of Education be directed to report to the Ontario Human Rights Commission and Mr. Bhadauria within a year and a half as to the nature of the process established and its implementation; and

(e) that the Ontario Human Rights Commission or Mr. Bhadauria be at liberty to apply to this Board of Inquiry for directions or for such further Order as may be necessary if the selection process as reported does not meet the objectives of this Order;

3. An Order that Mr. Bhadauria be granted the first available position as vice-principal at a secondary school in the Toronto Board of Education;

4. An Order that the Toronto Board of Education pay damages to Mr. Bhadauria under the following heads:

(a) damages reflecting the conclusion that on a balance of probabilities, if fairly assessed Mr. Bhadauria would have been awarded one of the vice-principal positions for which he applied and have earned the vice-principal's salary from then until now;

(b) damages for mental distress.

(B) ARGUMENT FOR THE RESPONDENT BOARD OF EDUCATION

[109] Counsel for the Toronto Board of Education began argument by referring back to the complaint itself and stating that all elements must be proven or the complaint should be dismissed. It was said that the Commission and Mr. Bhadauria failed to demonstrate that the vice-principal selection process adversely impacted upon Mr. Bhadauria and have pre-

sented only theoretical evidence of potential effect on other South Asians. In summary, the position of the Board of Education rested on five points:

(a) Neither the criteria, the oral interview process nor any other steps in the process of selecting vice-principals results in the exclusion of South Asians from these positions.

(b) The criteria and the interview are reasonable and *bona fide* elements for the selection of vice-principals required for the Board's schools.

(c) The successful candidates for the position best met the applicable criteria based on the best available assessment process possible in the circumstances and Mr. Bhadauria was never the best candidate for the position for which he applied.

(d) Acceptance of the Commission's case would amount to stereotyping a quarter of the world's population with the cultural characteristics presented and would amount to a contravention of the principles of the *Human Rights Code*.

(e) A finding of constructive discrimination in this case would place an employer in an impossible situation with regards to implementing a hiring or promotional system because special procedures would have to be adopted to meet with each concern of each particular culture.

[110] Mr. Bell stressed the many instances in Mr. Bhadauria's own evidence where he claimed to have performed very well in the interviews and admitted to becoming increasingly more comfortable in the interview process as time went on. It was said that there was nothing about Mr. Bhadauria as a South Asian which made him unable to respond while in the interview process. Indeed, we were reminded of Mr. Bhadauria's evidence where he asserted that he possessed and could display all the qualities required of a vice-principal.

[111] Mr. Bell dismissed the Human Rights Commission's expert witnesses as having limited expertise and basing their opinions on inaccurate understandings of the Board's process. In contrast, it was argued that the respondent's experts established that the Board used structured interviews that are recognized as valid assessment techniques. Further, it was argued that South Asians could not be seen to be disadvantaged in the interview because South Asians are too diverse a group about which to generalize.

[112] Further, it was argued that the interview itself is a good means of assessing communication skills and abilities as a vice-principal and is analogous to the daily circumstances facing a vice-principal. It was said to provide direct evidence of whether a person possessed the necessary qualities. It was submitted that the evidence established no disadvantage to South Asians in the process and, on the contrary, that South Asians can and do perform well. It was said that any displays of nervousness, deference or being ill at ease should not be limited to being attributable to South Asians or their cultural characteristics. Mr. Bhadauria's performance was said to be attributable entirely to reasons personal to him, namely an inability to listen, an inability to provide a direct response to a question and an inability to clearly articulate his position. Further, it was said that he displayed

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arrogance which resulted in him failing to capitalize on the many opportunities made available to him to improve in his interview performance. Mr. Bhadauria's qualities were said to put him at the level of what Dr. Leithwood described as a Level 1 administrator which may be "marginally effective" but not the type of person a selection procedure should try to choose or promote. Therefore, it was said that the interview was an appropriate assessment device and did not disadvantage Mr. Bhadauria or South Asians in general.

[113] Further, it was said that the criteria or requirements established for the vice-principal position were necessary and directly related to the job. It was argued that all the categories of criteria analyzed and highlighted by Dr. Leithwood were confirmed or unchallenged by the experts for Mr. Bhadauria or the Commission. It was said that there was no evidence of adverse impact of those criteria on South Asians in general and instead that there was evidence of sensitivity and concern for the rights of visible minorities.

[114] The Board challenged the Human Rights Commission's allegation that the criteria were applied without any method as being based on erroneous assumptions. Instead, the Board pointed to the methodology of utilizing multiple sources of information used to develop criteria, the development of questions from the criteria, the linkage of the questions to the job performance and asking the same questions of each candidate by the same interviewers all occurring within the same amounts of time. It was said that the Board established that the criteria were applied by a precise method that even meets the standards established by the experts for the Human Rights Commission. A point system was said to be inappropriate in assessing such a complex question as what would make a good vice-principal. Further, if any subjectivity remained in the Board's structure it is said to be appropriate given the nature of the judgment that must be made.

[115] Mr. Bell focused much of the Board's argument on Mr. Bhadauria himself. It was said that if Mr. Bhadauria's evidence that he had no difficulty displaying the qualities is accepted, the case should be dismissed. Alternatively, if Mr. Bhadauria's evidence is considered non-credible or unreliable, it was said that the case should be dismissed. It was argued that unless the evidence of alleged discrimination relates to Mr. Bhadauria, there could be no finding of a violation of s. 10. It was argued that Mr. Bhadauria's testimony lacks credibility and that he exaggerated his professional activities and credentials and was inconsistent about many things. However, foremost, Mr. Bell relied on a document written by Mr. Bhadauria to the Human Rights Commission in 1985, reaffirmed by him in his testimony, to show a penchant for exaggeration and unreliability (Exhibit IV, Tab 31).

In any event, the Toronto Board argued that the criteria's application and the interview format are reasonable and *bona fide*. It was said that no *prima facie* case had been made out against the Toronto Board or, in any event, it had been fully rebutted.

[116] Regarding the claim for damages, it was argued that the remedies sought went far beyond the initial claim and

amounted to an inappropriate exercise of discretion by a board of inquiry. Further, or in any event, it was said that Mr. Bhadauria had not proven to be entitled to damages for mental anguish because the complaint had not been proven and neither had mental anguish. The deficiency in the evidence was said to lie in the lack of any medical evidence and the fact that Mr. Bhadauria's claim to have suffered from his treatment is contradicted by evidence called by the Commission that no one noticed any changes in him except from the death of his father in 1984. Also, a lot of stress and distress could be attributable to Mr. Bhadauria's excessive work load due to his extra-curricular interests, and other problems and concerns in his life after 1984.

[117] In terms of the law, it was argued that the Human Rights Commission must establish that Mr. Bhadauria is a member of the well-defined group of persons who are hurt by the requirement imposed by the Board. Heavy reliance was made on the case of *Malik, supra*. Indeed, it was stressed that the acceptance of the concept of cultural tendencies of South Asians as espoused by the Commission would amount to cultural stereotyping. Further, it was argued that the Commission must establish that the Board's policies had a discriminatory effect upon Mr. Bhadauria specifically and that he was adversely affected. See *O'Malley, supra*, and *Singh v. Security and Investigation Services Ltd.*, (May 3, 1977), (Ont. Bd. Inq., Cumming) [unreported] at p. 15. Only once a right of the complainant under Part I of the Code has been infringed was it said that a remedy could be granted under s. 40(1) of the Code. Thus, it was said that since the cultural stereotype of South Asians was refuted by Mr. Bhadauria's own evidence about himself, it cannot be concluded that he was adversely affected in this case. Further, it was argued that the Toronto Board met the objective and subjective elements of *bona fide* and occupational requirements as set out in *Ontario (Human Rights Comm.) v. Etobicoke (Borough)* (1982), 3 C.H.R.R. D/781. Further, it was stressed that the evidentiary onus upon the respondent to show its policy is reasonable and *bona fide* only arises if and after Mr. Bhadauria or the Commission has made out a *prima facie* case of discrimination. See *Romano v. North York (City)* (1987), 8 C.H.R.R. D/4347 at D/4356 and D/4358 (Baum); *aff'd* (1988), 10 C.H.R.R. D/5807 (Ont. Div. Ct.).

[118] Further, or in any event, it was argued that there is no duty to accommodate short of undue hardship in s. 10(a) of the Code as it existed when the events in this case arose because of the defence of *bona fide* occupational qualification. See *Canadian National Railway Co. v. Canada (Canadian Human Rights Comm.) and Bhinder* (1986), 7 C.H.R.R. D/3093. The subsequent amendment to the Code in 1988 which provides expressly for a duty to accommodate was said to show the need for such language to create or impose such a duty and was said not to be retroactively applicable. See *Canada (Treasury Bd.) v. Robichaud* (1987), 75 N.R. 303 at 311-314, 8 C.H.R.R. D/4326 (S.C.C.). In any event, reasonable accommodation was said to only apply to discrimination based upon creed or religion. See *O'Malley, supra*, and *Bhinder, supra*. Further, the Toronto Board argues it has accommodated South Asians and visible minorities through the adoption of its race relations policies and the training of superintendents and potential candidates. It was argued that

it would be impractical to impose any further requirements upon it.

[119] In conclusion, the Board of Education made a request for costs which was agreed to be deferred until after the release of this award. Thus, no submissions were heard upon it. Both parties requested that any issues of quantum, if they should arise, would also be deferred and that this Board would retain jurisdiction over such issues as well as issues of implementation.

8. The Decision

[120] Discrimination is hard to prove. Those guilty of it rarely admit it. Evidence of discrimination is often susceptible to other benign interpretations. Constructive discrimination is probably harder to determine. It deals with circumstances that are not, on their face, discriminatory, but which result in discrimination. No intent is required. It can arise even in the most well-intentioned and innocent of situations. It can sometimes be revealed where one group can be seen to be more advantaged than another. But it is difficult to show disproportionate impact on a group where the experience of the group is small or the history is short. It is easier to show constructive discrimination if the requirement being questioned is easily identifiable such as height, age or sex. But in cases such as the one at hand where the requirements under scrutiny are personal characteristics, like "an ability to communicate" or "a sense of humour," they are hard to define and harder to analyze. However, such a difficult analysis must be done here to complete the mandate of this Board of Inquiry.

[121] Let us first examine the state of the law. Prior to the enactment of s. 10, a Board of Inquiry dealt with a claim of constructive discrimination arising because of the complainant's allegation that the interview component of the job competition adversely impacted upon him and other persons of his Pakistani background. See *Malik, supra*. The Board of Inquiry in that case was given no statistical evidence. But like the case at hand, the complainant relied upon the differences between the positive assessment of his work and the negative evaluation of his performance at the interview. Expert evidence was offered of the "deferential, non-assertive, low-key approach" taken by South Asians that would result in a poor presentation in the formal interview setting with superiors from the western culture. The Human Rights Commission's case in that situation asserted that the interview method would fall "disproportionately severely on persons of very traditional Muslim/Pakistani upbringing." However, other East Asians performed well in the same setting. It was concluded on the facts that there was no evidence of adverse impact upon the group or of a discriminatory pattern, largely because other East Asians fared well in the process. But more importantly, other relevant comments were made:

There is an added difficulty. The suggestion was really that Mr. Malik's culture and upbringing made him poorly suited to perform well in an interview even though his actual work performance was good. By suggesting that the interview result be invalidated because of its negative cultural implications, counsel for the Commission is indi-

rectly asking that the employer be told to design its selection mechanism in a way that would be sensitive to the strengths and weaknesses of applicants. These would be strengths and weakness, mind you, arising from or connected with race, creed, colour, nationality, ancestry or place of origin, for the Code does not prohibit the employer insensitivity to weaknesses stemming from other causes, like poverty or unstable family background. Yet the Code itself states in section 44(4):

No person shall use or circulate any form of application for employment or make any written or oral inquiry that requires an applicant for employment to furnish any information concerning race, creed, colour, nationality, ancestry or place of origin.

How the employer is to ensure a sufficient degree of even-handedness, given the inability to ascertain this information, was not elaborated upon. Similarly, even if he or she knew the exact composition of the applicant pool, it would be necessary to have in addition sensitive and accurate information about the strengths and weaknesses of each culture. How to prevent the intrusion of stereotype and assumption, and how to ensure that the selection mechanism is fair for each, differently composed, applicant pool without being prohibitively costly, are additional problems upon which we were not enlightened by counsel. Lastly, it is surely inevitable that someone whose culture and upbringing made him or her particularly suited to the interview format could complain if he were denied access to it because of the accident of the cultural composition of the group or his fellow applicants on a particular occasion.

[122] The *Malik, supra*, Board of Inquiry also dealt with flaws in the interview and rating processes that had been used and received expert evidence to explain the danger of those flaws. The Board of Inquiry was persuaded that the interview was not a business necessity. Nor was it even an appropriate selection technique for the job in question for the type of candidate that management wanted. Further, there were more appropriate selection methods available. In that context, the interview was described as a

... clumsy instrument, not particularly useful in matching characteristics with job requirements. Yet its frailty is not, of itself, sufficient ground for labelling it discriminatory

There are two important principles arising from the *Malik* decision, *supra*, that are applicable to s. 10 of the Code and to this case. The first principle is that in order to succeed in the claim, Mr. Bhaduria must show more than harm to himself. He must show adverse impact on a definable group of which he is a member. Secondly, establishing flaws in a selection procedure does not amount to proof of discrimination. The flaws must be shown to result in discrimination towards the defined group.

[123] It is evident that the Commission and the complainant seemed very mindful of the *Malik* decision, *supra*, in organizing the presentation of their case. The statistical and expert evidence was clearly designed to fill the gaps in evidence noted in *Malik* and to forge the critical links between the procedures of the respondent Board of Education and the discriminatory result. Thus, that evidence must be analyzed.

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[124] First, unlike that in the *Malik* decision, *supra*, the evidence here is successful in establishing that Mr. Bhadauria is a part of a "well-defined group." South Asia is indeed a huge geographical area encompassing millions of people, thousands of languages, hundreds of religions and an enormous variety of social patterns and behaviours. But the evidence presented to this Board of Inquiry from Dr. Berry is that social scientists have been able to define aspects of cultural behaviour common to this huge area. Dr. Ray's evidence sought to discount this by saying that the area was too diverse for one to ascribe cultural characteristics. But one need not have to choose between the evidence of Dr. Berry and Ray. Taken together, their evidence illustrates the difficulties with matters such as these. It is critical that people not be stereotyped and compartmentalized. Human beings and the concept of culture are too complex and too important. Stereotyping denies the wide variations and rich differences that exist among groups of people of different backgrounds and from different areas. However, that is not to say that similarities or "cultural tendencies" should be ignored or denied. Accepting and respecting such concepts can lead to better understanding and appreciation of various cultures and their traditions. Denying such tendencies or characteristics is to deny these very cultures. Such a denial is contrary to the *Human Rights Code*, is contrary to all levels of governments' appreciation of multiculturalism and is contrary to an enlightened sense of decency. Thus, the evidence of Dr. Berry can be accepted by this Tribunal to demonstrate that there is a South Asian culture with recognized characteristics and tendencies such as hierarchy and collectivism. But this also must be tempered by Dr. Ray's warnings not to descend into the trap of stereotyping. Instead, we must appreciate and be sensitive to the individual differences between and in each group of people and to be aware that within any cultural group there are wide variations in the patterns of behaviour.

[125] Therefore, the evidence in this case convinces this Board of Inquiry that there is a South Asian culture, showing certain characteristics. There is no question that Mr. Bhadauria is a member of that culture. Those characteristics which are critical to this inquiry are the characteristics of collectivism and of having a hierarchical attitude towards social encounters, especially formalistic ones.

[126] Having concluded that there is a recognizable South Asian culture to which Mr. Bhadauria belongs, we must then turn to the question of whether Mr. Bhadauria or the group has been disadvantaged by the policies of the Toronto Board of Education. The test articulated in *Romano, supra*, at D/4358, is that the respondent's policies have the impact of "singling out [a] particular group" such as South Asians. With respect, I do not accept that the evidence need go that far. It ought to be sufficient for the identified group to show that policies impact adversely on that group or any other group of persons sharing the same cultural characteristics who are identified by a prohibited ground of discrimination. Systemic discrimination has been described in *Action travail, supra*, at D/4227 as:

... discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote

discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (See the *Abella Report*, pp. 9-10).

It is also defined in *O'Malley, supra*, at p. 551:

It [systemic discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.

Therefore to determine if there has been adverse impact on a group of South Asians we must look to the impact on the "group" in the Board's vice-principal promotional procedures. Mr. Bhadauria's personal situation will be set aside for the moment.

[127] Adverse impact can be detected with the help of statistics. But given the low numbers available for analysis in this case, some caution must be exercised. Further, the inclusion or exclusion of Mrs. Finucane in the "pool" of South Asians is of some significance. In analyzing the statistical evidence, it is tempting to exclude Mrs. Finucane from consideration and take the complaint in its best perspective. However, for a variety of reasons, this would not be appropriate. If we are dealing with a complaint of adverse impact, all South Asians must be considered in the "pool" of South Asians. Mr. Bhadauria included Mrs. Finucane in a list of Board employees who he considered South Asian in his preparation of this case. Mrs. Finucane considers herself South Asian. Her origin, upbringing and practices include many South Asian elements. Quite simply, she is South Asian. It is also true that her background includes elements of western culture that have resulted in her having less of the South Asian cultural tendencies identified by the experts, such as accent, dress, social and marital customs. But in analyzing adverse impact one has to take the "pool" as defined. It is inappropriate to identify a pool and then seek to carve out of the "pool" those who don't conveniently fit into the mold. All the experts agree that studies of cultural tendencies reveal that people within the culture display wide ranges of behaviour. That must be taken into account. To exclude Mrs. Finucane would be tantamount to saying she is only "a little bit" South Asian. This would be disrespectful to her heritage and a denial of reality. Or it would mean that the "pool" consisted only of South Asians with certain cultural tendencies. The *Human Rights Code* protects people from discrimination on the basis of race, ancestry, ethnic origin, etc. It protects all South Asians. It does not protect people from discrimination on the basis of certain personality characteristics. So, in analyzing statistics, I am satisfied that we must include Mrs. Finucane as a South Asian. Therefore, we have been shown that, during the relevant time, the appointment of Mrs. Finucane means that the Board had one South Asian vice-principal. That places the respondent Board with-



in a "range of statistical acceptability" according to the experts. But given the low numbers involved and the limits on the "meaning" of such evidence, that is not a conclusive defence for the respondent Board. It is just one factor to weigh in the final equation.

[128] Aside from Mr. Bhaduria, we heard some evidence of how other South Asian applicants fared in the interviews. One did not display any of the identified cultural characteristics. Another candidate may have displayed some characteristics, yet the evidence is weak in that area. The evidence does not establish that either was disadvantaged by reason of their South Asian backgrounds. We have evidence that the Board heard expressions of concerns and perceptions of discrimination by South Asians during the relevant time. But these expressions and perceptions are not proof and they cannot be considered as evidence of the truth of their contents. It is true that little was done by the Board to address the difficult issues of cross-cultural assessment. The evidence suggests that selection committees in general may have had difficulty perceiving some of the qualities they were seeking in South Asian applicants.

[129] But the issue is whether the cultural tendencies of South Asians disadvantaged them in the Toronto Board's interview process. The Commission alleges that the South Asians' hierarchical and collectivist natures made them reticent, reluctant to reveal and overly formalistic. Thus they were less able to demonstrate the qualities the Board was seeking in a vice-principal. This allegation is not to be confused with an assertion that South Asians do not have a sense of humour, an ability to communicate or an appropriate attitude towards discipline. Rather, the allegation is that they cannot convey these qualities in the formal interview context because of their cultural background. However, all that the Commission was able to establish through their expert evidence is that this is a theoretical problem. There is no evidence that this occurred to the South Asian group or individual members of the group in this case. Further, there is evidence to the contrary. Mrs. Finucane succeeded. Also, while she is not an expert on South Asian culture, she offered a common-sense approach to what perspective ought to be given to the "deferential attitude" and cultural tendencies of South Asian applicants in the context of this case:

They have been teaching with the Board for many years before they would apply for a position of vice-principalship. I assume . . . I hope that people of all cultures would be polite, deferential and show respect in an interview situation such as one is put through when one is applying for a job as vice-principal. . . . The people who would apply for positions of vice-principalship within our Board would be familiar with the social mores under which they are being employed, and with what they are surrounded

Mrs. Finucane is highlighting the fact that all those who were accepted into the vice-principal selection process, and indeed who were short-listed for the pre-interviews, would be aware of and comfortable with the operating social mores in the Toronto Board or they would not have made it that far. They were all experienced and successful teachers who were well integrated into the system and who had worked in the Toronto Board for many years. We are not dealing with an

entry level problem. In the context of an interview for promotion conducted by supervisors, all applicants would show a degree of deference, respect and nervousness. Such conduct would not only be appropriate but would not be peculiar to South Asians or any specific cultural group. With regard to the collectivist tendency to be reluctant to reveal personal information to someone from outside the South Asian culture, again the evidence does not establish that this occurred or was a factor in any decision. There is certainly not enough evidence to establish a *prima facie* case.

[130] Nor does the evidence show that the "criteria" or their application disadvantaged South Asians. Dr. Leithwood's evidence supports the notion that virtually all "criteria" generated by parents, students and staff were "job-related" to the role of vice-principal. His synthesis of the many criteria into the six identifiable categories illustrates that they are all related to recognizable job skills and abilities that could be expected of a vice-principal. So in that sense they are justifiable and act as the reliable "job predictors" that Drs. Fekken and Cronshaw demand for "valid" selection procedures. Further, it was easy to see why criteria such as "openness of mind" and "being a firm but fair disciplinarian" may have been perceived to have been vague and applied subjectively. However, the evidence shows that the committees operated on a shared understanding of the standards to apply. While the superintendents who testified had weak memories for details, they were all very strong witnesses who exhibited qualities of honesty and reliability in their evidence. They were all very credible and they expressed a unity of purpose and philosophy about the criteria they applied to the candidates' selections. I have no hesitation in concluding that they evaluated on a primarily objective basis. In some instances subjective judgments inevitably came into play because of the subjective nature of some criteria. But the system of decision by consensus and the structure of the interview would tend to eliminate the element of bias in such an evaluation.

[131] The evidence is convincing that untrained interview teams conducting unstructured interviews may well be putting South Asians and other visible minorities in a disadvantageous position because their personal qualities will not be recognized. But the evidence here is that the selection committees were composed of highly educated, senior administrators who were charged with the responsibility to implement the Board's race relations policy. The expert evidence is that such individuals are less susceptible to bias and interviewing error than the population at large. Further, the Board used a form of structured interview. The elements of structure were the application of the "Banks" criteria of leadership, the consideration of the lists of "criteria" as the basis of the questioning, the shared understanding among the selectors of the criteria to apply asking the same questions of all the candidates by the same superintendents, the 20-minute time frame, the making of notes, and the "go round" search for consensus in decision-making. A structured interview, conducted by an enlightened committee has been shown by the evidence to be capable of achieving a reliable and non-biased decision. In such an interview, persons with South Asian and other cultural characteristics can be treated and assessed equally with others. [In the absence of] statistical and actual evidence of disadvantage to South Asians as a

group, it cannot be concluded that the Board's procedures had an adverse impact.

[132] This leads inevitably to a consideration of Mr. Bhadauria's case as an individual and the question of whether he was adversely affected by the Board's policies. It is very easy to see why he has so forcefully asserted this claim. Mr. Bhadauria was successful as a teacher, as a department head and as a summer school principal. He has more than the necessary academic qualifications of a vice-principal and he was acknowledged to be capable of fulfilling the position by virtue of being accepted into the eligibility for the competitions and selected at least four times in the short-listing process. Witnesses testified as to his personal qualities of intelligence, sense of humour, leadership abilities, communication skills and his appropriate approaches to discipline and administration throughout the relevant years. Yet, at the interviews he left a starkly different impression with the supervisory officials on the basis of a twenty-minute question and answer session. The Human Rights Commission and Mr. Bhadauria's counsel submit that this "stark difference" is conclusive evidence that the Board's interview procedures and methods adversely impacted upon Mr. Bhadauria as a South Asian. The respondent Board counters by saying one should look at Mr. Bhadauria's own self-assessment of the interviews where he says he was open, confident and able to successfully display all the criteria under consideration. This was said to be evidence that either Mr. Bhadauria does not fit the identified cultural tendencies of a South Asian or that he was simply not disadvantaged. In reply, the Inquiry was cautioned against the reliability of self-assessment and told that the cultural tendencies have so influenced Mr. Bhadauria's life that they inevitably affected his performance in a formal interview and made him unable to judge how he was perceived by a panel of interviewers from another culture.

[133] In assessing Mr. Bhadauria's situation, let me start by agreeing that, for purposes of analyzing his treatment at these interviews, the only relevant time period to consider is 1980 to 1984. I am prepared to accept the complainants' evidence of Mr. Bhadauria as an extremely accomplished and capable person. I am also prepared to draw an adverse inference against the respondent Board of Education for its failure to call the evidence of Mr. Condi or Mr. Turner who had direct information about Mr. Bhadauria's conduct and abilities during that time. The inference that must be drawn is that their evidence would have supported Mr. Bhadauria's case. Further, while extensive attempts were made to discredit Mr. Bhadauria's credibility as someone who exaggerated his credentials or who ought not to be believed, these attempts fell short of destroying Mr. Bhadauria's factual credibility. More will be said later about his perceptions and the conclusions he has drawn from the facts, yet for purposes of determining the facts I am prepared to accept his factual testimony about the interviews as reliable. He has better recall of the details of the interviews than did the Board's witnesses. Indeed, the Board's witnesses did not take issue with the substance of the testimony given by Mr. Bhadauria in these areas.

[134] With all that in mind, Mr. Bhadauria's situation must be examined. While he was pre-interviewed at least four

times, he never went further. The evidence is clear that his performance at the interview was the determining factor in preventing any further advancement. In other words, his interview performance destroyed his chances of promotion. Therefore, the interview step did clearly disadvantage Mr. Bhadauria. But for his claim to succeed, it must be established that the interview disadvantaged him as a result of his being a member of a group which is being disadvantaged in a way prohibited by s. 10 of the Code. But the evidence of Mr. Bhadauria's performance does not establish that he was adversely impacted as a result of his South Asian origin and culture. The evidence establishes that he was able and willing to communicate a great deal of information in some areas at the interview. The committees' negative reaction was due to the content of the information they received, not the way it was communicated. This was particularly the case with regard to his comments about discipline. They cannot be attributed to his culture. While wise people may differ over whether Mr. Bhadauria's comments about discipline and the examples he offered were appropriate or not, the selection committees' disapproval was based upon disagreement with him in substance. That was their prerogative. Their disapproval was not related in any way to any cultural perceptions or misconceptions.

[135] In other areas, he was unable to communicate well to the interviewing committees. He was perceived to be arrogant and resentful and seemed to feel that self-evident questions should not be asked. However, he admits he considered himself to be the best candidate for each position and that he felt a great deal of information ought to have been known to the committee, such as his extra-curricular activities. He was resentful that the committee was not already aware of his extensive extra-curricular contributions. It is evident from his testimony that he simply did not understand the nature and the purpose of the interview and the purpose of questions that sought to elicit what Mr. Bhadauria considered to be self-evident answers. He did not understand that an interview offered an opportunity to explain himself and his accomplishments. Despite two special sessions given to him by Mr. Hayes to improve his performance, the evidence does not show a great deal of difference in the interview styles that Mr. Bhadauria exhibited. He was given specific advice on how to improve. While he did tone down his voice, he made none of the other improvements suggested to him. It is clear from Mr. Bhadauria's passionate testimony that he believes that he is the victim of direct discrimination. But the case as framed against the respondent by the Human Rights Commission and Mr. Bhadauria's counsel is not one of direct discrimination. Thus, I must look at the evidence of adverse effect of the interview procedure and the criteria applied upon Mr. Bhadauria in this process. I accept that his own self-analysis of a superior performance at an interview must be viewed cautiously. But it cannot be discounted. If indeed he did present "the best Jag Bhadauria ever" and was "confident" and "comfortable" and able to display all the necessary qualities that he agrees the Board had a right to seek, how can it be concluded that he was adversely impacted by the interview or the criteria? The evidence to the contrary is substantial. Other candidates who were equally well qualified in a technical sense performed better at the interview. His cultural tendencies may have inhibited him initially. But

the overwhelming evidence is that certainly by 1983, he was familiar and comfortable enough with the process, had enough coaching and was sufficiently integrated into the society of Toronto and the Board of Education that his cultural tendencies did not affect his performance. Individual personality traits and attitudes can and must be separated from cultural tendencies. It was the former that seemed to have influenced the selection committees, not the latter. Further, while Mr. Bhadauria's testimony did reveal certain South Asian cultural characteristics such as accent, it cannot be said that the evidence links Mr. Bhadauria to the cultural tendencies of excessive deference towards authority or collectivism that would impede the interview. No interviewer mentioned this as a problem. None of Mr. Bhadauria's colleagues ever observed such a quality. On the contrary, Ed Houghton remarked that some teachers were intimidated by principals at staff meetings. But when asked if Mr. Bhadauria was one of that type of individual, the response was "He certainly was not."

[136] Further, the evidence also shows that while the Board recognized and accepted that Mr. Bhadauria would be a good "administrator," that was not the kind of person they were seeking for the vice-principal vacancies. The good administrator would be one who would only achieve "Level One" of Dr. Leithwood's effectiveness scale. Mr. Bhadauria's own testimony quoted above on p. 11 reveals that he perceived the duties of a vice-principal to be mostly administrative and managerial in nature. Mrs. Banks expressed concern that he used the word administrator "a lot" and thus did not appreciate the nature of the role expected by the Board. The concepts of leadership articulated by Board witnesses and the "criteria" reveal a search for candidates who would focus on interpersonal relationships and curriculum development. They are more in line with Dr. Leithwood's Level Two and Three "effectiveness." Thus, it was Mr. Bhadauria's limited vision and articulation of the role that impeded him, not his cultural tendencies. So it cannot be concluded that he was adversely affected by virtue of his South Asian origin and culture.

[137] Having concluded that there is not sufficient evidence of adverse impact on Mr. Bhadauria or South Asians as a group, this decision could well end here. However, given the enormous amount of effort expended by the parties in this case over the examination of other issues, it is only fair to continue this award by addressing some of those issues. Many of the following comments may be *obiter dicta*, however, they are intended as guidance and assistance to the parties in the future.

[138] Since the interview itself was the main focus of the attack of this case, it also deserves further mention. The evidence established that an interview *per se* is not an inappropriate selection technique. There are other techniques that may be more reliable in some circumstances and a variety of relevant information is always preferable as a basis of a decision. This is only common sense. But in order to be a valid and reliable selection tool, an interview must be structured. There are many aspects of structure which the Board applied such as asking the same questions of all the candidates in the same order, and deciding on the basis of con-

sensus. Other elements can and should be adopted such as formally agreeing upon clear selection criteria ahead of time and working from a job description. The superintendents here operated on a shared understanding of what was required which had built up over years of working together with the same values. Also, they had the statutory guidelines of the *Education Act* and Regulations which serve as a general job description. In reality, the evidence supports their claim that they did operate on a set of clear selection criteria such as those set out by Mrs. Banks in her evidence and which is quoted above. But the candidates and further selection committees deserve to know what those criteria are and the basis upon which they will be operating.

[139] In the specific context of choosing a vice-principal for a secondary school, I am fully convinced that a structured interview is a justifiable method. Selectors can look to other job performances and direct, reliable references and observations for a good picture of a candidate. Cognitive ability tests are also appropriate to determine some information. Assessment centres may also be desirable, costs permitting. But, vice-principals must perform in an interview context in several of their day-to-day functions. They will be in a position of formal, stressful "interviews" with parents, Board administrators and principals where the vice-principal is in an inferior role vis-à-vis hierarchy. Likewise they will be in the role of a superior in formal interviews with teachers and students. In all these roles the vice-principal must perform well under stress, be able to articulate Board policy and communicate effectively. Dr. Leithwood's evidence is convincing that the type of interview provided by the Board gives a very appropriate vehicle to collect information as to how a candidate can be expected to perform under those circumstances. It acts as a type of job sample. Thus, it is both fair and appropriate for a candidate to be expected to submit to an interview process and to perform successfully if s/he is seeking a vice-principal position.

[140] The question then arises as to how much weight should be accorded to the interview. Mr. Bhadauria's case is a dramatic illustration of the importance of the interview because his history with the Board and as a summer school principal showed that he has "a high degree of potential that was well worth looking at more closely" according to Dr. Leithwood. The Board did not do that. Their process was to do the opposite. The Board looked closely at Mr. Bhadauria's "potential" when they accepted him into the pre-interview. The Board then stopped looking at him once they saw his performance at the pre-interview. This illustrates the potential problem in the way the Board used the structured interview. It is indeed a valid examination tool and its results deserve significant weight. But it, like other valid assessment tools, must be viewed together with other sources of information. Mr. Bhadauria may well wonder how it can be that he failed to progress when he had succeeded so well before. The Board would be well advised to think twice when it finds interviews revealing information inconsistent with previous performance patterns. But the evidence showed that many other people who were short-listed many times also failed to get past the interview. Also, other successful summer school principals never got promoted to vice-principalships. Thus, it may be that the interview may reveal something significant about a

candidate that had not surfaced elsewhere and that ought to stand in that candidate's way. This may be something as simple but fundamental as an inability to explain Board policy under stress. If all candidates are relatively equal when they enter the interview, a failure in this important area may be a valid determining factor. This was one of the factors that influenced the Board regarding Mr. Bhadauria. All this leads to the conclusion that the structured interview itself is not inappropriate and the conclusions ought not to be ignored. However, the Board should carefully reassess how much weight ought to be accorded to the interview. Where interview results show a very different picture than job performance achievements, cautious weight should be accorded to the interview.

[141] All of this is relevant to s. 10(a) of the Code because even if the Human Rights Commission had established a *prima facie* case of adverse impact, I still would have concluded that the use of the structured interview was reasonable and *bona fide* in the circumstances here. It did provide useful and relevant information to the selectors. It is a recognized and accepted tool of industrial psychologists. Other methods may be available such as assessment centres and other forms of testing. However, the interview here was used honestly, in good faith and was clearly believed to be the best method of selecting the best candidate for the job. Thus it meets the test in *Etobicoke*, *supra*.

[142] Further, I am satisfied that the structured interview and the criteria for selection were objectively related to the successful performance of the responsibilities of a vice-principal. Dr. Leithwood's evidence relates all of the leadership criteria used in the selection process to those of an effective vice-principal, including those which were specified in the complaint. Further, the interview itself is a form of job simulation of some of the vice-principals' key duties. Thus, the Board procedures can be accepted as reasonably necessary to ensure the proper performance of the job and as a valid and reliable selection technique satisfying the tests set out in *Air Canada*, *supra*, *Malik*, *supra*, and *Antonio*, *supra*. I do not accept the Human Rights Commission's characterization of criteria as being vague and impressionistic. As they were applied by the Board of Education, the criteria were clear and objective and sought qualities of leadership that one would hope and expect to find in a vice-principal.

[143] It may well be that in a case such as this there is no duty on a respondent to accommodate the needs of South Asians. First, there is an absence of adverse effect. Further, under the Code that operated between 1981 and 1984 s. 10 had no specific duty to accommodate included in it, although the duty was added as of April 18, 1988. Thus the Code may be interpreted in light of the *Bhinder* decision, *supra*, where no duty to accommodate was found to arise [in the absence of] the specific requirement and where the defence of *bona fide* occupational qualification exists and was proven. But, in any event, I am satisfied that the concept deserves comment. Previous boards of inquiry have discussed the difficulties inherent in trying to satisfy a duty to accommodate when dealing with cultural characteristics such as personality traits, as opposed to age and height requirements. The citation from the *Malik* decision, *supra*, is

an articulate expression of the difficulties which may be encountered when trying to devise selection techniques sensitive to cultural differences. But that decision and the overriding principles ought not to be taken to suggest that an employer needs to design a selection mechanism to be sensitive to the strengths and weaknesses of every individual culture. The evidence of Drs. Fekken, Berry and Cronshaw shows that valid and reliable selection techniques can be adopted that eliminate the halo effect and diminish problems of stereotyping. This produces the "even-handedness" that was called for in the *Malik* decision, *supra*, and amounts to a form of appropriate accommodation. We cannot have a system that says because South Asians have a hierarchical and collectivist nature they need not be subjected to interviews. What about other cultures with other cultural tendencies? An employer need not adopt different selection techniques for different cultures. It need only adopt an "even-handed" selection process that does not contain elements that would allow for the operation of stereotyping and prejudice that would cloud the evaluation of candidates. On the basis of the facts presented, I am satisfied that the Board of Education had such a system. It is a system which is flawed. The flaws will be explained below. But the results of the flaws will impact equally on all the candidates. The price the Board pays for those flaws is that it may not have chosen the best candidate and it has opened itself up to claims such as this. But it does not mean that it has offended s. 10 of the Code.

[144] Further, the Board of Education has made accommodation to visible minorities, including South Asians. It has largely implemented an ambitious race relations policy, it has human rights training sessions for administrators and supervisory staff, it seeks input into the selection criteria from the multicultural staff, students and parent constituencies, and it is providing specific interview training for candidates. Further and better measures are obviously possible and would greatly improve the system. But the standard is not one of perfection. "Reasonable accommodations" have been made by the Toronto Board of Education.

[145] Even though I have concluded that the Board has not violated the Code, it must also be said very forcefully that the Board's vice-principal selection process between 1981 and 1984 was so seriously flawed in so many aspects that it is no wonder that a complaint of this nature has come forward. The Board recognizes this to some extent and I was given evidence of modifications to the process beginning in 1985. But the earlier processes contain several flaws which must be exposed and which lead to the perception of discrimination and indeed potentially to constructive discrimination itself. Some of these flaws have not been rectified in the processes adopted in 1985. The problems are as follows:

1. There was no standardized format for applicants to submit their *curriculum vitae*.
2. *Curriculum vitae* were not provided to all the selection committee members for all the applicants at the short-listing stage. Thus, members of the selection committee did not have a full and complete set of information on all the candidates when making the selection for the pre-interviews. These should be provided well in advance of the meetings.

3. Candidates were never told of the specific role expected of a vice-principal at the school where the vacancy occurred. However, this was something that was discussed and made known to the selection committee and acted as a consideration for selection by the committee. It should be part of a "job description" or contained in the initial advertisement for the vacancy.

4. Other than the statutory description of principal and vice-principal, there is no standardized job description for the position of a vice-principal in general or for each individual school. While there is probably no confusion in the minds of those applying for vice-principalships or those selecting vice-principals as to what the role and expectations are in the job, the process of formulating a job description would be of inestimable value in standardizing the selection procedures and preparing candidates for the interviews.

5. Because each area superintendent gave oral reports on the candidates to the selection committee at the short-listing stage, there is a huge potential for abuse and misinformation because good candidates could be effectively kept out of contention if an area superintendent failed to support that candidacy. There is no evidence that such a problem occurred. However, the short-listing committee needs more information on all candidates from more sources which should be provided in a standardized way in order to do a fair job in selection.

6. No records of the selection process of the short-listing or pre-interview stage were retained. For the protection of the Board of Education and for the professional development of the candidate, these records should be retained and made available to candidates in appropriate circumstances.

7. No clear method of assessment was ever formulated. The evidence is convincing that a points system is difficult to devise that can assess the complex personality traits and abilities that are required of a vice-principal. But a flexible and recognizable system would assist all in the process. It will also help to justify decisions and could well forestall complaints such as this.

8. Candidates were told that they would be judged only upon the criteria contained in the lists generated by parents, teachers and students. However, in reality, many other factors affected the selection, namely:

- (a) The particular role the vice-principal would perform in the school.
- (b) The particular needs of that school.
- (c) The overriding vision that the administration had as to what a "good leader" ought to be.
- (d) The potential for advancement of the candidate beyond the role of vice-principal.
- (e) The variety of experience that the candidate had had in other schools.
- (f) The number of years the candidate had been in the system.
- (g) The performance in previous interviews.

The Board's failure to fully advise all the candidates about

these additional considerations in the selection process affected all the candidates equally. However, candidates should not have been misled by the misinformation given to them.

9. In some instances, not directly relevant to this case, such as June 1981, area superintendents were required to interview large numbers of candidates for three schools in one day. It is true that time requirements may have made this unavoidable. But the reality is that very little meaningful analysis of the criteria for those schools or the candidates would have been possible in a short period of time.

10. The interview committees were not given enough cross-cultural sensitivity training to avoid the concerns which have been articulated about their ability to perceive characteristics of other cultures. The committees were sensitized to the Board's race relations policies and were regularly reminded of a desire to promote visible minorities. However, the cross-cultural sensitivity training was lacking.

11. A confusing message has evolved about the use of criteria. The "criteria" elicited from parents, students and staff were not in fact the criteria used for selection. The actual leadership criteria being applied were never articulated to the candidates. In fairness to the parents, students, staff and candidates, the Board must come to terms with this confusion.

12. The Board has not successfully implemented all the recommendations of the *Race Relations Report*. This must become a major priority.

All these flaws are significant and expose the Board to the valid criticisms heard throughout this case by the Human Rights Commission. They may have also resulted in errors in the selection process where good candidates were screened out. But, as observed in the *Malik* decision, *supra*, it is not sufficient to establish a flawed process in order to succeed in a claim under s. 10 of the *Human Rights Code*. All that was established in this case was that we were dealing with a very flawed system. These flaws hurt everyone involved in the process. However, the evidence did not go so far as to establish that the alleged adverse impact on South Asians occurred.

[146] One final aspect of this case must be addressed. There is no doubt that Mr. Bhadauria's disappointed ambitions have had a devastating effect upon him. He blames this disappointment for causing many terrible changes in his life and for affecting his physical and emotional health, his family life and his commitment to many intellectual and social causes. Had a breach of s. 10 been established I would be faced with the difficult, if not impossible, task of determining what changes in Mr. Bhadauria's life could be linked to any discrimination by the respondent Board. Much of the respondent's case was preoccupied with trying to show that any changes in Mr. Bhadauria's life should not be attributed to the Board's conduct. But given the findings above, no such determination need be undertaken. However, the evidence is clear that Mr. Bhadauria was a significantly changed person after 1984 with regard to his own self-respect and his commitment and feelings towards the Toronto Board of Education. I wish to emphasize that none of the evidence received

about Mr. Bhadauria's conduct and state of mind after 1984 was utilized or determinative of the question of whether a violation of s. 10 has been established. However, evidence of Mr. Bhadauria's conduct after 1984 would have been relevant for purposes of determining an appropriate remedy. Where emotional damage is established one would never want the effects of discrimination to be such that the victim is no longer eligible for the employment opportunities he sought to protect in a complaint. However, there was evidence about Mr. Bhadauria's conduct and attitude after 1984 that would have been relevant on the question of remedy alone. That would have been the evidence in Exhibit IV, Tab 31 as reaffirmed by him in cross-examination and Exhibits A, B and C. Those exhibits and much of Mr. Bhadauria's testimony contain unsubstantiated and unsustainable accusations against the integrity of Board personnel. Altogether they reveal that he has a significant loss of perspective and lack of judgment about many things, including the Toronto Board of Education and its policies. As a vice-principal and as an employee of the Board, he would be charged with the responsibility of implementing and administering the policies of his employer. His negative attitude cannot be attributed solely to any discrimination that occurred, because none did. His attitude has probably been fostered by his honest and profound belief that he has been a victim of discrimination.

However, unfortunately this mistaken belief has resulted in him conducting himself in ways that would make me reluctant to have exercised my discretion to grant him his requested remedy of being given the first available vice-principalship at a secondary school. Had I found a violation of the Code, given the sensitive and important role of a vice-principal in the schooling of students, that remedy would not have been appropriate under the circumstances of this case.

[147] Having reached the conclusions stated above, the complaint is therefore dismissed. Since the issue of costs has been deferred, I retain jurisdiction over that aspect of the case, should the need arise.

[148] In conclusion, I wish to repeat and re-emphasize the comments I made to counsel at the closing of these hearings. This case involved many days of difficult and demanding litigation. It is easy in retrospect to criticize counsel for some of the positions that they took or some of the ways that the case was conducted. However, I wish to extend my overriding appreciation to all counsel for their professionalism, their candour and their advocacy skills. They all served their clients extremely well. Further, in the highest traditions of advocacy, they all gave invaluable assistance to this Board of Inquiry.

C A N A D I A N
C. H. R. R.
HUMAN RIGHTS REPORTER

QUÉBEC
CIVIL STATUS / EMPLOYMENT
Indexed as: **Godbout v. Longueuil (City)**

Volume 12, Decision 11

Paragraphs 1 - 56

August 1990

Michèle Godbout

Complainant

v.

Ville de Longueuil

Respondent

and

Procureur général du Québec

Mis-en-cause

Appearances by: France St-Laurent and Guy Gamache,
Counsel for the ComplainantJean-Jacques Rainville and Louis-
Philippe Bourgeois, Counsel for the
Respondent

CIVIL STATUS—employment terminated on basis that residence outside city limits—CANADIAN CHARTER OF RIGHTS AND FREEDOMS—s. 7 (security of the person)

Date of Decision: March 31, 1989

Before: Quebec Superior Court, Gérard
Turmel J.

File No.: 505-05-000727-880

Summary: *The Superior Court dismisses a complaint brought against the City of Longueuil by Michele Godbout who alleged that she was discriminated against when she was fired from her employment because she moved outside of the City limits.*

